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No. 06-465

IN THE

Supreme Court of the United States

SHARON PRICE AND MICHAEL FRUTH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a negotiated Federal Trade Commission consent order operates, as a matter of federal law, as a safe harbor immunizing non-parties to the consent order from liability under otherwise applicable state law for conduct similar to that permitted under the order.

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Sharon Price and Michael Fruth, individually and on behalf of all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the Illinois Supreme Court in this case.

INTRODUCTION

This case presents an important and recurring issue of federal law concerning the legal effect of a federal consent order on non-parties to the order — an issue that has long divided the state supreme courts and the federal courts of appeals. In a 4-2 decision, the Supreme Court of Illinois overturned a $10 billion bench verdict against Philip Morris on the ground that Philip Morris's conduct was "authorized" by certain Federal Trade Commission ("FTC" or "Commission") consent orders to which Philip Morris was not a party. That supposed "authorization," the court held, immunized Philip Morris from liability under Illinois law for a massive and decades-long fraudulent scheme that enticed consumers into buying so-called "light" cigarettes on the false promise that they were lower in tar and nicotine. That legal conclusion is deeply flawed — contrary to Congress's intent as embodied in the Federal Trade Commission Act ("FTC Act"), decisions of this Court, the FTC's practice with respect to consent orders, and a landmark federal court judgment in a suit brought by the United States.[1]

The legal rule adopted by the Illinois Supreme Court — that FTC consent decrees "authorize" the acts of non-parties — is the subject of a deep and mature conflict, with the Eighth Circuit and Alaska Supreme Court agreeing with the Illinois Supreme Court's erroneous view that FTC consent orders establish legal precedent with respect to non-parties to those consent orders, and the D.C., Sev-

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[1] *See* Final Opinion at 3-4, *United States v. Philip Morris USA, Inc.*, Civ. A. No. 99-2496 (GK) (D.D.C. Aug. 17, 2006) (observing that Philip Morris has "marketed and sold" its "lethal product" — including light cigarettes — with "zeal," "deception," and "a single-minded focus on [its] financial success, and without regard for the human tragedy or social costs that success exacted").

enth, and Federal Circuits, and the supreme courts of Florida and Massachusetts, correctly holding that FTC consent orders have no legal effect outside the proceeding in which they are entered. Left uncorrected, the decision below will undermine the FTC's use of the consent settlement process, weakening federal enforcement efforts against unfair and deceptive consumer practices nationwide and dimming the prospects that consumers will be recompensed for injuries resulting from Philip Morris's pervasive frauds.

OPINIONS BELOW

The opinion of the Illinois Supreme Court (Pet. App. 1a-150a) is reported at 848 N.E.2d 1. The opinion of the Illinois Circuit Court (Pet. App. 167a-216a) is unreported (available at 2003 WL 22597608).

JURISDICTION

The Illinois Supreme Court entered its judgment on December 15, 2005. A petition for rehearing was denied on May 5, 2006. *See* Pet. App. 217a (dissent from denial of rehearing reported at 848 N.E.2d 89-98 (Pet. App. 151a-166a)). On July 25 and August 28, 2006, Justice Stevens granted extensions of time within which to file a certiorari petition to and including September 5 and October 2, 2006, respectively. *See id.* at 261a-262a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Illinois Consumer Fraud and Deceptive Business Practices Act and the Illinois Uniform Deceptive Trade Practices Act, and 15 U.S.C. § 45 and 28 U.S.C. § 1257, are set forth at Pet. App. 235a-260a.

STATEMENT OF THE CASE

A. The FTC and State Deceptive-Practices Statutes

The FTC was created in 1914 as an independent federal agency to ensure that companies compete fairly in the market. *See* Act of Sept. 26, 1914 ("FTC Act"), ch. 311, § 1, 38 Stat. 717, 717-18. Congress later extended the reach of the FTC Act to protect consumers by prohibiting

"unfair or deceptive acts or practices," and charged the FTC with enforcing that mandate as well. *See* Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111, 111. Today, the FTC enforces a passel of consumer-protection statutes in addition to the FTC Act. *See* 16 C.F.R. § 0.4 (listing statutes).

1. The FTC has considerabl prosecutorial, adjudicatory, and rulemaking authority to carry out its statutory duties, both with respect to individual defendants and on an industry-wide basis. The FTC is generally "empowered and directed to prevent . . . unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). Like most federal agencies, it has broad discretion to issue industry-wide trade rules, *see id.* § 57a, and it has issued nearly 700 pages of such regulations. *See generally* 16 C.F.R. Pts. 0-901. Not a single page of those regulations concerns cigarettes. *See id.* Pt. 408 (intentionally left blank by the FTC).

When the FTC finds that a person is in violation of the Act, it "shall issue and serve upon such [party] a complaint stating its charges . . . and containing a notice of a hearing." 15 U.S.C. § 45(b). The defending party has a right to a hearing to "show cause why an order should not be entered . . . requiring such [party] to cease and desist from the violation of the law so charged in said complaint." *Id.* The FTC and the defending party may, however, settle a complaint prior to adjudication through a negotiated consent order. *See* 16 C.F.R. §§ 2.31-2.34. The FTC Act distinguishes between enforcement of cease-and-desist orders and negotiated consent orders. The Act provides that, if the FTC enters a cease-and-desist order, it may bring a civil action for a violation of that order against a party to the order, *see* 15 U.S.C. § 45(*l*), and even, under limited conditions, against a defendant that was not a party to the order, *see id.* § 45(m). But the FTC is barred from bringing such an enforcement action against a non-party based upon a purported violation of a "consent order." *Id.* § 45(m)(1)(B).

2. Notwithstanding its broad statutory authority to remedy deceptive practices, the FTC has long pursued a cooperative relationship with States in carrying out its consumer-protection mandate. Indeed, owing to "crucial and probably inherent limitations" of the FTC, it has "strongly endorsed and emphasized the need for complementary state law enforcement work." William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724, 729 n.10 (1972). With the FTC's encouragement of state enforcement efforts, "[a]ll fifty states and the District of Columbia have enacted at least one statute . . . aimed at preventing consumer deception and abuse in the marketplace." National Consumer Law Center, *Unfair and Deceptive Acts and Practices* 41 (4th ed. 1997). Those state statutes "incorporat[e] the FTC Act concepts of deception and unfairness and . . . provid[e] significant state and private remedies," and thus are "particularly important" in redressing "marketplace misconduct and abuse of consumers" because the FTC Act provides for "only FTC enforcement and not state or private enforcement." *Id.* Two-thirds of state deceptive-practices statutes except conduct authorized by federal law.[2]

3. Illinois is no exception. Illinois has adopted two deceptive-practices statutes — the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act"), 815 ILCS 505/1 *et seq.*, and the Illinois Uniform Deceptive Trade Practices Act ("Deceptive Practices Act"), *id.* 510/1 *et seq.* Those statutes are modeled on the FTC Act and seek "to protect consumers, borrowers, and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 960 (Ill. 2002). In keeping with the majority of States, each statute has an exception for conduct approved by a

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[2] *See* Pet. App. 234a (compendium of state statutes); Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 31 n.160 (2005) (collecting statutes).

federal regulatory agency. The Consumer Fraud Act exempts "[a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." 815 ILCS 505/10b(1). Likewise, the Deceptive Practices Act does not apply to "conduct in compliance with the orders or rules of or a statute administered by a Federal, state or local governmental agency." *Id.* 510/4(1).

B. Proceedings in the Illinois Trial Court

Sharon Price and Michael Fruth brought this class action against Philip Morris under the Illinois deceptive-practices statutes. The gravamen of their claim was that Philip Morris had engaged "in a common course of deceptive and unlawful conduct" by, among other things, falsely or misleadingly representing its light cigarettes as delivering "lowered tar and nicotine in comparison to regular cigarettes," "intentionally manipulating" the design of its cigarettes to "maximize nicotine delivery," and "employing techniques . . . [to] reduce machine-measured levels of tar and nicotine . . . , while actually increasing the harmful biological effects" of the cigarettes. Second Am. Compl. ¶ 11 (filed Feb. 11, 2003).[3]

Philip Morris insisted, among other things, that its conduct was "authorized" by the FTC and therefore exempt from the state deceptive-practices statutes. Philip Morris argued that the FTC provided legal sanction for all cigarette makers to use the descriptors "light" and "low tar" by entering into consent orders with certain cigarette makers to settle FTC enforcement actions. Specifically, Philip Morris pointed to a consent order entered into in 1971 by the FTC and American Brands, Inc. That order settled a complaint charging that American Brands had advertised its cigarettes with a comparative claim of being

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[3] The trial court certified a class of all persons who purchased Philip Morris's Cambridge Lights and Marlboro Lights cigarettes in Illinois for personal consumption between the first date that Philip Morris put those cigarettes into the stream of commerce and February 8, 2001.

"lower in tar" although, according to the FTC's allegations, its cigarettes contained five times the amount of tar found in the lowest-yielding brand. *See* Pet. App. 218a-223a (*In re American Brands, Inc.*, 79 F.T.C. 255 (1971) ("1971 consent order")). Under the terms of the settlement, American Brands could advertise that its cigarettes had "'low,' 'lower,' or 'reduced'" tar if the advertisement was accompanied by a disclosure of "[t]he 'tar' and nicotine content in milligrams in the smoke produced by the advertised cigarette." *Id.* at 222a.

Philip Morris also relied on a 1995 consent order between the FTC and American Tobacco Company. That order settled a complaint charging that American Tobacco had made misleading representations, for example, that "10 packs of Carlton have less tar than 1 pack" of competitors' brands. *See id.* at 224a-233a (*In re American Tobacco Co.*, 119 F.T.C. 3 (1995) ("1995 consent order")). By the terms of the settlement, American Tobacco could not "represent[], through the presentation of the tar ratings of any of [its] brands of cigarettes as a numerical multiple, fraction or ratio of the tar of any other brand of cigarettes." *Id.* at 231a. Further, the order provided that "presentation of the tar and/or nicotine ratings of any of [American Tobacco's] brands of cigarettes and the tar and/or nicotine ratings of any other brand (with or without an express or implied representation that [American Tobacco's] brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine) shall not be deemed" to violate the ban on numerical comparisons. *Id.* at 232a.

After a seven-week bench trial, the state trial court held that Philip Morris had violated Illinois' deceptive-practices statutes. The court found that Philip Morris introduced light cigarettes "to provide smokers who were concerned about their health with a product that could reduce the cognitive dissonance associated with smoking and thereby allow them to continue to smoke cigarettes." *Id.* at 175a (¶ 31). But Philip Morris knew that its light cigarettes would not deliver less tar and nicotine than

regular cigarettes, *id.* at 182a (¶ 56), and, in fact, designed its cigarettes "in such a way as to reduce the machine-measured tar and nicotine delivery while at the same time allowing consumers to extract the same levels of tar and nicotine from these products as they would extract from [regular cigarettes]," *id.* (¶ 57).

The court rejected Philip Morris's argument that its conduct was specifically authorized by federal law, including the 1971 and 1995 consent orders, and therefore was exempt from the state deceptive-practices statutes. The court reasoned that "[n]o regulatory body has ever required (or even specifically approved) the use of [the light descriptors] by Philip Morris." *Id.* at 202a (¶ 124).

The trial court awarded the 1.14 million members of the class compensatory damages of $7.1005 billion and punitive damages of $3 billion. *See id.* at 206a, 209a (¶¶ 146, 157). The court ordered that any portion of the compensatory award unclaimed by the class be distributed to law schools, the American Cancer Society, domestic violence programs, and legal aid services. *See id.* at 214a-215a.

C. Proceedings in the Illinois Supreme Court

The Illinois Supreme Court ordered that Philip Morris's appeal bypass the normal appellate process and be heard directly by it. In an opinion that drew a special concurrence and two independent dissents, the court reversed the trial court's decision, holding that Philip Morris's conduct was not actionable under state law because federal law — namely, the 1971 and 1995 FTC consent orders — authorized Philip Morris to use the terms "light" and "low tar" to describe its cigarettes. *See* Pet. App. 1a-150a.

The court framed the issue of the case as follows: "If the use of these descriptive terms [*i.e.*, "light" and "low tar"] in the manner alleged has been specifically authorized by the FTC in the course of carrying out the duties assigned to it by Congress, this action cannot stand, even if the terms might be found deceptive by a trier of fact. Similarly, if these terms have been used by [Philip Mor-

ris] in compliance with the orders or rules of the FTC, an action under the Deceptive Practices Act is also barred." *Id.* at 49a (citation omitted). In the court's view, the dispositive issue was the federal-law question "whether the FTC has specifically authorized the use of these terms." *Id.* at 85a; *see also id.* at 70a ("The question for this court is whether the entry of [an FTC] consent order, expressly directing one industry member to behave in a certain way, is an implicit authorization for other industry members to conduct themselves in the same manner."); *id.* at 57a (defining authorization to mean "giv[ing] legal authority" or "formally approv[ing]").

The court observed that no principle of Illinois law required that federal authorization occur via "formal rulemaking," *id.* at 59a-60a, and that Illinois law did not address whether the FTC had meant to or could give any legal sanction to Philip Morris's conduct, *see id.* at 65a-67a. The court thus deemed it essential "to delve deeply into the functions and actions of [the FTC]." *Id.* at 67a. Looking to the "FTC's own published materials and cases from the United States Supreme Court and the federal courts," the court held that, although the 1971 and 1995 consent orders were entered into between the FTC and two specific cigarette companies, they "authorized other members of the tobacco industry to act in accordance with their terms." *Id.* at 67a-68a. The court based that conclusion specifically upon various "statements and actions" by the FTC, *id.* at 68a-70a, decisions of this Court pertaining to federal administrative law, *see id.* at 70a-72a, and decisions of other federal courts of appeals, *see id.* at 73a-79a. Using the same reasoning, the court disposed of plaintiffs' claims under the Deceptive Practices Act. *See id.* at 87a.

Justice Karmeier filed a special concurrence, joined by Justice Fitzgerald. Although joining the majority opinion, Justice Karmeier explained that he also would reverse the trial court on the ground that plaintiffs had failed to prove that they had suffered damages from "switching from

regulars to lights" and thus "pa[id] any more for cigarettes than they would have otherwise." *Id.* at 91a.

Justice Freeman, joined by Justice Kilbride, vigorously dissented. In his view, "the 1971 and 1995 FTC orders cannot be considered to have industrywide legal force." *Id.* at 119a. He explained that "'[c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms.'" *Id.* (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971)). Thus, he reasoned, courts have "no authority to expand . . . a consent order's terms" to establish a general rule. *Id.* at 120a. He concluded with the admonition that the court's decision would "send a chill wind over consumer protection." *Id.* at 140a. Justice Kilbride, joined by Justice Freeman, dissented separately, reasoning that the 1971 and 1995 consent orders "[were] not, and did not purport to be, a rule or regulation permitting the entire cigarette industry to use these or any other descriptors." *Id.* at 146a. Instead, he explained, those consent orders were merely "compromise[s] of . . . disputed claim[s]." *Id.*

On May 5, 2006, the court, over the dissenting votes of Justices Freeman and Kilbride, refused to rehear the case. *See id.* at 151a-166a, 217a. Justice Freeman criticized the court for failing to seek the FTC's view on the legal effect of its consent orders, arguing that the court's decision created "the possibility of a multitude of interpretations by several states of the same FTC voluntary consent orders," which would undermine "uniform administration of FTC policy." *Id.* at 162a. Refusing to seek the views of the FTC given that Commission consent orders were "at the heart" of the majority opinion, he stated, would be "embarrassing" for the court. *Id.* at 165a-166a.

REASONS FOR GRANTING THE PETITION

THE ILLINOIS SUPREME COURT GRAVELY MISCONSTRUED FEDERAL LAW, DEEPENING CONFLICTS AMONG STATE SUPREME COURTS AND FEDERAL COURTS OF APPEALS ON THE LEGAL EFFECT OF FTC CONSENT ORDERS

A. A Mature Conflict Exists On The Legal Effect Of FTC Consent Orders

1. *The Eighth Circuit and the Alaska Supreme Court, like the court below, have held that FTC consent orders may authorize non-parties to engage in conduct permitted under the orders*

In *Watson v. Philip Morris Cos.*, 420 F.3d 852 (8th Cir. 2005), *petition for cert. pending*, No. 05-1284 (filed Apr. 7, 2006), the Eighth Circuit reached the same conclusion as the Illinois Supreme Court in this case: that the 1971 consent order embodies the official policy of the FTC, applicable to non-parties. There, the plaintiffs sued Philip Morris in state court alleging, as in this case, that Philip Morris had engaged in deceptive practices by labeling as "light" and "lower in tar and nicotine" cigarettes that did not actually have less tar and nicotine than other cigarettes. Philip Morris removed the suit to federal court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), claiming that it was "acting under" the FTC because the 1971 consent order authorized Philip Morris to use light descriptors for cigarettes that, like those so labeled by Philip Morris, registered low levels of tar and nicotine in machine testing. The Eighth Circuit concluded that removal was proper even though Philip Morris was not a party to the 1971 consent order, holding that the consent order announced official FTC policy, binding on non-parties, and, therefore, that the plaintiffs' claims "directly implicate[d] the enforcement and wisdom of the FTC's tobacco policies." 420 F.3d at 862.

The Alaska Supreme Court reached a similar conclusion about the legal purpose and effect of FTC consent orders

in *State v. O'Neill Investigations, Inc.*, 609 P.2d 520 (Alaska 1980). There, the Attorney General brought suit under the Alaska Unfair Trade Practices and Consumer Protection Act, Alaska Stat. §§ 45.50.471-45.50.561, which prohibits "unfair or deceptive" acts in connection with commerce, *id.* § 45.50.471. The Act provided that, in determining what constitutes an unfair or deceptive act, "'due consideration and great weight should be given the interpretations . . . of the [FTC] Act['] . . . made by the [FTC] and the federal courts." 609 P.2d at 523 (quoting Alaska Stat. § 45.50.545). The Alaska court held that the Attorney General properly relied on FTC consent decrees to establish that the defendant's acts were deceptive, rejecting the argument that FTC consent decrees do not constitute an official or binding interpretation of law. Citing this Court's decision in *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385 (1959), the court squarely held that "adjudications which are resolved by consent decree constitute an administrative interpretation of the [FTC] Act which have clear precedential value." 609 P.2d at 529 & n.30.[4]

2. *In direct conflict with those decisions, the D.C., Seventh, and Federal Circuits, and the supreme courts of Florida and Massachusetts, have held that FTC consent orders do not constitute binding legal authority*

In *Trans Union Corp. v. FTC*, 245 F.3d 809, *on denial of reh'g*, 267 F.3d 1138 (D.C. Cir. 2001), the D.C. Circuit directly rejected the view, accepted below, that FTC consent orders implicitly authorize non-parties to engage in similar conduct. There, Trans Union challenged an FTC decision that lists of names and addresses of customers were "consumer reports" under the Fair Credit Reporting Act

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[4] The Maine Supreme Judicial Court has also decided, albeit implicitly, that FTC consent orders have precedential effect on non-parties. *See Searles v. Fleetwood Homes of Pennsylvania, Inc.*, 878 A.2d 509, 520 (Me. 2005) (relying, in part, upon an FTC consent order as setting forth a legal standard applicable to a non-party to the consent order).

and thus could not be sold to "target marketers" — *i.e.*, companies that use such lists to contact consumers with offers of products and services. The FTC had decided that, among other things, Trans Union could not disclose age information to target marketers. *See In re Trans Union Corp.*, Docket No. 9255, 2000 FTC LEXIS 23 (F.T.C. Feb. 10, 2000). In doing so, the FTC noted that, by the terms of a previous consent order, a competitor of Trans Union *was* "permit[ted] to use [such] age information," but held that the previous consent order was "not before [it] in this matter and it is without precedential effect to this opinion." *Id.* at *38 n.22.[5]

In rejecting Trans Union's challenge to the FTC, the D.C. Circuit held that it was not necessary to address any inconsistency between the FTC's current decision with respect to Trans Union and the previous consent order. The court expressly affirmed the FTC's holding that the consent order "[was] not before [the FTC] in this matter and it [was] without precedential effect on this opinion." 245 F.3d at 816-17 (internal quotation marks omitted).

In *Beatrice Foods Co. v. FTC*, 540 F.2d 303 (7th Cir. 1976), the Seventh Circuit similarly held that an FTC consent decree has no legal effect outside the proceeding in which it was entered. In that case, the FTC had ruled that Beatrice Foods' acquisition of another company violated section 7 of the Clayton Act, 15 U.S.C. § 18, because the acquisition resulted in an overly concentrated market. On appeal, Beatrice Foods noted that in an earlier case

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[5] That holding is in accord with an earlier FTC decision regarding Trans Union. There, an administrative law judge had gleaned a rule of general applicability from a consent order that guided his disposition of the Trans Union matter. *See In re Trans Union Corp.*, 118 F.T.C. 821, 832 (ALJ decision 1993, affirmed as modified by full Commission 1994). The FTC expressly rejected that view, explaining that "[o]f course . . . the Commission's consent agreement . . . [did not] govern the result in this case." *Id.* at 846. The FTC made clear that it need not resolve any conflict with the previous consent order because "[t]hat consent agreement is binding *only between* the Commission and [the party to the order]." *Id.* at 864 n.18 (emphasis added).

the FTC had entered into a consent decree that permitted an acquisition resulting in greater market concentration than that which resulted from Beatrice Foods' acquisition. Beatrice Foods argued that, because the FTC had permitted that prior acquisition, its acquisition must also be lawful. The Seventh Circuit rejected the argument, reasoning that "[t]he entering of a consent decree . . . is not a decision on the merits and therefore does not adjudicate the legality of any action by a party thereto. Nor is a consent decree a controlling precedent for later Commission action." 540 F.2d at 312.[6]

Like the D.C. and Seventh Circuits, the Federal Circuit has held that consent orders have no legal effect outside the proceeding in which they are entered. In *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695 (Fed. Cir. 2001), Intergraph brought suit against Intel, alleging that Intel violated the antitrust laws. The district court dismissed the claims under the law-of-the-case doctrine, because the Federal Circuit had held in an earlier appeal that Intergraph had not suffered an antitrust injury. *See id.* at 697. Affirming the district court, the Federal Circuit rejected Intergraph's argument that a consent order entered into between the FTC and Intel addressing the same conduct challenged by Intergraph warranted a departure from the law-of-the-case doctrine. Although acknowledging that the doctrine may not apply when "new . . . material evidence" is introduced or there is "an intervening change of controlling legal authority," the court sided with the Seventh Circuit's holding in *Beatrice Foods* to conclude that the consent order was not material, because "a consent

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[6] The Second Circuit has indicated that it also would follow that rule: "Unlike an agency regulation which has industry-wide effect, a consent order is binding only on the parties to the agreement." *General Motors Corp. v. Abrams*, 897 F.2d 34, 36 (2d Cir. 1990); *see also ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 222 n.23 (2d Cir. 1976) (consent orders, which provided that they "did not constitute an admission . . . that the law has been violated," could not be relied on in other proceedings) (internal quotation marks omitted).

order does not establish illegal conduct." *Id.* at 698 (citing *Beatrice Foods*, 540 F.2d at 312).

The Florida Supreme Court has likewise concluded that an FTC consent order has no authoritative weight against those who were not a party to it. In *Sakon v. Pepsico, Inc.*, 553 So. 2d 163 (Fla. 1989) (per curiam), a teenager who was injured while attempting a dangerous stunt portrayed in a Pepsi commercial brought suit against Pepsico, alleging that it had negligently failed to include in the commercial a warning that viewers should not attempt the stunt. In ruling that Pepsico did not have a duty to include such a warning, the Florida court rejected the argument that FTC consent orders arising from similar facts established that Pepsico had such a duty. The court explained that "[n]o legal standard of duty is set forth in a consent order, and there is no legal precedent arising from consent orders." *Id.* at 166.

The Massachusetts Supreme Judicial Court arrived at the same legal conclusion in *Whitinsville Plaza, Inc. v. Kotseas*, 390 N.E.2d 243 (Mass. 1979). There, the court rejected the argument that conditions in a land deed were unenforceable because FTC consent decrees established that such conditions were *per se* violations of the antitrust laws. Relying exclusively on decisions of federal courts, the court correctly held that consent decrees "are not . . . authoritative interpretations of Federal law." *Id.* at 252.

This line of decisions, which properly holds that FTC consent orders have no legal effect on non-parties, cannot plausibly be reconciled with the contrary holdings of the Illinois Supreme Court below, the Eighth Circuit, and the Alaska Supreme Court. This Court's review is necessary to resolve this sharp split of authority and to establish the proper legal effect of an FTC consent order on those who were not a party to it.

B. The Illinois Supreme Court Erred In Interpreting Federal Law As Giving Any Authoritative Legal Effect To FTC Consent Orders

It is undisputed that the FTC has never issued a regulation or rule approving or regulating *any* cigarette company's use of the descriptors "low tar" or "lights." Nor has it adopted such a rule through an adjudicated decision. Nevertheless, the Illinois Supreme Court held that Philip Morris's use of light descriptors — even if fraudulent and deceptive — had been legally sanctioned by the FTC through the 1971 and 1995 consent orders that settled enforcement actions brought against *other* cigarette companies. That extraordinary conclusion rests on a fundamental mistake of federal law.

1. *Well-settled authority establishes that FTC consent orders have no legal effect on non-parties*

a. Congress has made clear that FTC consent orders have no legal effect vis-à-vis non-parties. Before 1994, the FTC Act provided that, "[i]f the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty . . . against any [party] which engages in such act or practice." 15 U.S.C. § 45(m)(1)(B) (1988). In 1994, Congress amended that provision to codify, with respect to civil penalties, the FTC's longstanding practice of not according precedential effect to consent orders. The provision now states: "[i]f the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order, *other than a consent order*, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty . . . against any [party] which engages in such act or practice." 15 U.S.C. § 45(m)(1)(B) (emphasis added). Through that provision, Congress instructed that FTC consent orders are a unique category of

agency orders that should not be treated as establishing industry-wide standards.[7]

The legislative history of the 1994 amendment confirms that understanding. In explaining the reason for the amendment, the House Report states unequivocally that "a case settled by a consent agreement would not qualify as a precedent for a section [45(m)(1)(B)] proceeding because the legal and factual issues in question would not have been subject to challenge in an adjudicatory proceeding." H.R. Rep. No. 103-138, at 14 (1993). The Report contrasted consent orders, which involve no factual or legal determinations, with cease-and-desist orders, which issue "after all factual and legal issues have been fully adjudicated." *Id.* In addition, the Report stated that it was "the FTC's current practice not to seek penalties based upon nonrespondent violations of outstanding consent agreements and this subsection codifies that practice." *Id.*

b. This Court has confirmed that an FTC consent order has no legal effect on those who were not parties to it. In *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961), du Pont challenged a district court's order requiring divestiture by pointing to FTC consent decrees not requiring divestiture entered in similar cases. This Court rejected the argument, reasoning that "the circumstances surrounding *such negotiated agreements* are *so different* that they cannot be persuasively cited in a litigation context." *Id.* at 330 n.12 (emphases added). The teaching of *du Pont* is straightforward: because FTC consent orders reflect a negotiated compromise, they are neither binding on nor available as a legal safe-harbor for non-parties.

Since *du Pont*, this Court has repeatedly reaffirmed the rule that consent orders have no legal effect on non-

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[7] *See* Patricia A. Davidson & Christopher N. Banthin, *Untangling the Web: Legal and Policy Tools to Restrict Online Cigar Advertisement*, 35 U.S.F. L. Rev. 1, 18 n.125 (2000) (Section 45(m)(1)(B) "allows the FTC to forbid certain conduct based on issuance of a final order as long as the party is aware of the order. This *rule-like procedure does not apply to consent decrees.*") (emphasis added, citation omitted).

parties. It has held, for example, that judicial consent decrees are creatures of contract, "'entered into by parties to a case after careful negotiation has produced agreement on their precise terms.'" *Carson v. American Brands, Inc.*, 450 U.S. 79, 86-87 (1981) (quoting *Armour*, 402 U.S. at 681). Accordingly, applying basic precepts of contract law, the Court has held that consent decrees "impose[] [no] obligations on a party that did not consent to the decree." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986). Likewise, the Court has held that a consent decree cannot prejudice the rights of strangers to the proceeding, even though they may have actual knowledge of the settlement or the underlying litigation. *See Martin v. Wilks*, 490 U.S. 755, 762-65 (1989).

This Court's decision in *United States v. Armour & Co.*, which involved a judicial consent decree entered into by the FTC and three meat packers, is particularly instructive. The issue there was whether a proposed acquisition by Greyhound Corporation of a controlling share of stock in Armour would violate the terms of the so-called Meat Packers Consent Decree of 1920, which prohibited Armour from participating in certain industries. The Court held that the consent decree did not bar the proposed transaction because its plain text prohibited Armour only from participating directly in certain industries, not from the acquisition of Armour by a company engaged in those industries. *See* 402 U.S. at 677-79.[8]

In so ruling, the Court rejected the claim that to allow the transaction would permit the very evils that had motivated the consent decree. *See id.* at 680-81. The Court explained that "[c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms." *Id.* at 681. "Naturally," the

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[8] The Court noted that "[t]he Government does not contend that Greyhound's acquisition of controlling interest in Armour subjects Greyhound to punishment for contempt since it was *not a party to the decree*." 402 U.S. at 676-77 (emphasis added).

Court reasoned, "the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." *Id.* at 681-82. It followed that "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *Id.* at 682. *Armour* thus articulates a rule that consent decrees — and, hence, FTC consent orders — cannot, under federal law, have the purpose or effect of setting forth an industry-wide rule outside the decree's text.[9]

c. Consistent with *du Pont*, the FTC has consistently held that its "[c]onsent decrees provide no precedential value." *In re Rambus Inc.*, Docket No. 9302, 2004 FTC LEXIS 17, at *550 (ALJ decision, Feb. 23, 2004); *see also, e.g., In re Telebrands Corp., et al.*, Docket No. 9313, 2004 FTC LEXIS 154, at *125 (ALJ decision, Sept. 15, 2004) (citing *du Pont* for proposition that "[t]he fact that the

[9] This Court's decision in *Mandel Brothers* is not to the contrary. There, the Court noted that its view of the proper statutory construction of the Fur Products Labeling Act was also supported by a "contemporaneous construction" of the Act by the FTC in *In re Ed Hamilton Furs, Inc.*, 51 F.T.C. 186 (1954). 359 U.S. at 391 & n.6. Although styled a "Stipulation for Consent Order," the order ending that FTC proceeding was, in essence, a cease-and-desist order. The defendant in that proceeding stipulated to the record, withdrew its answer to the FTC's complaint, and, most importantly, "agree[d] that the order . . . shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon." 51 F.T.C. at 193-94. That language is conspicuously absent in the 1971 and 1995 consent orders. In any event, this Court severely limited *Mandel Brothers* in *du Pont*, where it held that consent orders "cannot be persuasively cited in a litigation context." 366 U.S. at 330 n.12. *Mandel Brothers* accordingly has no application in a case, such as this, where a consent order is nothing more than a negotiated settlement.

[FTC] has previously accepted consent orders with a performance bond . . . does not provide sufficient legal foundation to impose such a bond in this case"). The FTC has explained that consent orders are not "controlling case precedent," because "[s]uch orders are negotiated by the parties" and "they are not based on any finding of violation, a necessary predicate to an adjudicated order." *In re Chrysler Corp.*, 87 F.T.C. 719, 742 n.12 (ALJ decision 1975, adopted as modified by full Commission 1976); *see also In re Trans Union*, 118 F.T.C. at 864 n.18 (a "consent agreement [with one party] is binding only between the Commission and [that party]").[10]

The rule that FTC consent orders have no legal effect on non-parties reflects the realities of FTC enforcement actions. Consent orders, by their nature, reflect compromises between the parties, and therefore do not represent the FTC's full and considered views. *See Armour*, 402 U.S. at 681-82. The FTC "may settle for less stringent provisions . . . because of the public interest savings in time, money, and uncertainty which the settlement will provide." Stephanie W. Kanwit, *Federal Trade Commis-*

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[10] The FTC's position on the legal effect of its consent orders is longstanding. *See, e.g., In re Beatrice Foods Co.*, 86 F.T.C. 1, 50 (ALJ decision 1973, adopted as supplemented and modified by full Commission 1975) ("In contrast to the procedures in a divestiture order, a consent order entered into by the Commission is not an adjudication on the merits of a matter and is not binding. The Commission in such a proceeding does not determine the legality or illegality of the conduct involved, consent orders contain no complete findings of fact, and many of the factors considered are known only to the Commission and are not a part of the public record. The courts and the Commission have consistently held that a consent decree is not a binding judicial precedent because of these factors, as well as the fact that they are based entirely upon the bargaining of the parties.") (citations omitted); *In re Berger*, 56 F.T.C. 1000, 1003 n.3 (ALJ decision, adopted as modified by full Commission 1960) ("[t]he orders issued in each of these cases were based on consent agreements" and thus "they cannot be considered as legal precedents"); *In re Federal Employees' Distrib. Co.*, 56 F.T.C. 550, 574 (ALJ decision, adopted by full Commission 1959) (holding that case cited "resulted in a consent order under agreement of parties and is not a precedent in other cases *for any purpose*") (emphasis added).

sion § 12:4, at 12-9 (2004) (hereinafter "Kanwit-*FTC*") (internal quotation marks omitted); *see also Abrams*, 897 F.2d at 39 (FTC may settle to avoid "the expense, delay and risks of litigation"); *cf. Armour*, 402 U.S. at 681-82. A private party's agreement with a consent order likewise often depends on considerations such as the "uncertainty and expense" of litigation and a desire to "preserve the confidentiality" of the matter. Kanwit-*FTC* § 12.4, at 12-9.

The Illinois Supreme Court thus fundamentally misapprehended the purpose and effect of an FTC consent order. A consent order seeks to prohibit rather than to authorize conduct, and thus reveals little or nothing about the FTC's official view of the underlying conduct or the remedy imposed via a settlement. Nor does it imply that others in the same industry may freely engage, without fear of sanction, in conduct similar to that allowed under the order to the settling party. Indeed, "the principal purpose of a consent order is to *avoid* the fact finding and adjudicating process," *Ford Motor Co. v. FTC*, 547 F.2d 954, 956 (6th Cir. 1976) (emphasis added), thereby relieving the FTC of the need to formulate an industry-wide standard by allowing it to tailor a narrow and fact-specific remedy applicable to only the settling party.

d. The circumstances surrounding the 1971 and 1995 consent orders confirm that they did not have the legal purpose or effect of regulating non-parties. At the time of the 1971 order, the FTC "could only recover civil penalties from a respondent which violated a cease and desist order that had been previously issued *against it*." Kanwit-*FTC* § 10:7, at 10-32 (emphasis added). In 1975, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act added section 45(m), which authorized the FTC to bring an action against any person that violated a cease-and-desist order. That change enabled the FTC to use cease-and-desist orders "to legislate prospectively and put businesses on notice of acts or practices that have been adjudged to be unfair and deceptive." *Id.* at 10-33. Thus, at the time of the 1971 consent order,

even if the FTC had issued a fully adjudicated *cease-and-desist* order against American Brands, that order could not have had legal effect on Philip Morris. It follows *a fortiori* that the 1971 *consent* order could not have "authorized" Philip Morris's acts.

Further demonstrating that the consent orders did not function as industry-wide rules are the FTC's proposed revisions in 1997 to cigarette testing methodology. In a notice inaugurating that rulemaking, the FTC sought comment on whether to define light cigarette descriptors and observed that there are no "official definitions" for descriptors such as "low tar" and "light." Notice, *Cigarette Testing; Request for Public Comment*, 62 Fed. Reg. 48,158, 48,163 (1997); *see also id.* ("Is there a need for official guidance with respect to the terms used in marketing lower rated cigarettes?"). Such a request for public comment would have been completely unnecessary if the 1971 and 1995 consent orders served as industry-wide rules.

Even more telling is that the major cigarette companies, including Philip Morris, filed joint comments with the FTC in that proceeding stating plainly that "[t]he manufacturers are not convinced that there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes." Comments of Philip Morris Inc., *et al.*, at 94, *On the Proposal Entitled FTC Cigarette Testing Methodology*, FTC File No. P944509 (filed Feb. 5, 1998); *see also* Philip Morris Petition for Rulemaking Concerning Tar and Nicotine Testing and Disclosure (FTC filed Sept. 18, 2002) (petitioning FTC to promulgate a rule authorizing use of light descriptors). Those comments — which do not even advert to the 1971 and 1995 consent orders — cannot be reconciled with Philip Morris's claim now that since 1971 the FTC has provided legal guidance with respect to Philip Morris's use of light descriptors.[11]

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[11] In a voluminous opinion resolving the nearly seven-year-long trial brought by the United States against leading cigarette makers, the United States District Court for the District of Columbia held, contrary

In addition, nothing in the text of the two consent orders themselves suggests that they were intended to have industry-wide application. The 1971 consent order made clear that American Brands' "signing of the agreement . . . is for settlement purposes only and does not constitute an admission . . . that the law has been violated." Pet. App. 221a. Moreover, the order was carefully limited only to "American Brands, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device." *Id.* at 222a. Similarly, the 1995 consent order stated that "the signing of said agreement is for settlement purposes only and does not constitute an admission . . . that the law has been violated." *Id.* at 230a. The 1995 order provided that it binds only American Tobacco Co. and "its successors and assigns." *Id.* at 231a. Those provisions would have been unnecessary — indeed, inappropriate — were the FTC aiming to announce an industry-wide rule. *Cf. In re Rambus*, 2004 FTC LEXIS 17, at *550 (a consent order did not have precedential value, in part, because it acknowledged that "the agreement is for settlement purposes only and does not constitute an admission of a law violation").

2. *The state supreme court's additional rationales for treating FTC consent orders as authorizing Philip Morris's conduct are erroneous*

The court below also misconstrued or misunderstood various other materials upon which it erroneously relied to conclude that the 1971 and 1995 consent orders "authorized" Philip Morris's conduct. *See* Pet. App. 67a-78a.

For example, the court relied on the FTC's 1964 statements that, in accord with this Court's decision in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), it may use orders en-

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to Philip Morris's assertions here, that "the FTC does not impose, regulate, or require [the use of light descriptors]. How those terms are applied, and on which brands, is entirely up to the tobacco companies." Final Opinion at 1632 n.52, *United States v. Philip Morris USA* (internal quotation marks and alterations omitted).

tered in adjudicated cases to announce standards of "general application." Pet. App. 69a-70a. From this noncontroversial statement about an agency's ability to choose between adjudication and rulemaking when it declares principles of general application, the court inferred, in an unwarranted leap of logic, that "a consent order may serve as authorization for nonparties to the order to follow its directives." *Id.* at 70a. That conclusion both overstates the FTC's views and conflicts with the Commission's statement in 1971 — when the American Brands consent order was entered into — that a suit against a single violator resolved through a consent decree is not meant to bind "all firms engaged in [the] questionable practice." *Annual Report of the Federal Trade Commission*, H.R. Doc. No. 92-211, at 7 (1971).

The court likewise erred in relying on *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), in which this Court held that federal agencies may establish policy via either rulemaking or adjudication. *See id.* at 292-94. Nothing in that decision supports the state supreme court's view that an action settled by a consent order instead of by formal adjudication "establish[es] agency policy." Pet. App. 70a. In fact, *Bell Aerospace* suggests that agencies often choose adjudication to avoid formulating universal standards. *See* 416 U.S. at 294. Nor does *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973), support the court's judgment. There, the D.C. Circuit refused to imply a private right of action under the FTC Act, explaining that Congress gave the FTC enforcement authority because of its "expertise in dealing with commercial practices, its ability to act as a buffer in securing voluntary compliance through informal proceedings, and its sound discretion in determining when formal enforcement measures were necessary." *Id.* at 995-96. Nothing in that language (or the rest of the decision) speaks to the dispositive question here — whether FTC consent orders "authorize" the conduct of non-parties.

Finally, the court cited the FTC's occasional grouping of consent orders within the broad category of the agency's "regulatory activity" as a reason to imbue the 1971 and 1995 consent orders with legal force. *See* Pet. App. 72a. A decision by the FTC to list consent orders under a particular heading in a congressional report can hardly overcome the weight of congressional, Supreme Court, and FTC authority establishing that FTC consent orders can neither permit, nor prohibit, conduct by non-parties. A consent order is quite plainly a form of "regulatory activity" insofar as it affects the conduct of a particular party in a particular situation, but that says nothing about whether a consent order sanctions conduct by a non-party.

In short, none of the authorities cited by the court below supports its profoundly mistaken view that FTC consent orders regulate or authorize the activities of non-parties.

C. The Issues Of Federal Law Raised By This Case Are Important And Recurring

1. Litigation against Philip Morris is pending in state and federal courts nationwide in connection with decades of fraud and deception in its marketing of light cigarettes. In those cases, Philip Morris has insisted its conduct was authorized, if not directed, by the FTC.[12] To remove state-law actions to federal court, for example, Philip Morris has argued that the FTC consent orders constitute regulation sufficient to warrant federal officer removal under 28 U.S.C. § 1442(a)(1). *See, e.g.*, Philip Morris Brief at 47, *Kelly v. Martin & Bayley, Inc.*, No. 06-1756 (7th Cir. filed June 19, 2006) ("*American Brands* and *American Tobacco* had the purpose and effect of regulating all major manufacturers, not just the two companies involved."). Philip Morris has also maintained that FTC consent orders preempt state law. *See, e.g.*, Philip Morris Opening Brief at

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[12] *See, e.g., Marrone v. Philip Morris USA, Inc.*, 850 N.E.2d 31, 41-42 (Ohio 2006) (noting that Philip Morris's arguments regarding supposed authority conferred upon it by the 1971 consent order could "doom" plaintiffs' claims under the Ohio deceptive-practices statute).

59-60, *Price v. Philip Morris Inc.*, No. 00-L-112 (Ill. filed Dec. 10, 2003). In resolving those issues, state supreme courts, as well as federal courts of appeals, will be called upon to determine whether, under federal law, FTC consent orders authorize conduct by non-parties.

Uniformity in the treatment of those orders is an essential component of justice. Correcting the state court's error now is especially important in view of the extraordinary disconnection between the holding that Philip Morris is wholly immunized from state liability because of *authorization from* federal law and the fact that the United States is currently suing Philip Morris for *violation of* federal law for the same conduct. Such manifest inconsistency mocks the credibility of state and federal judicial systems.

The significance of this litigation also can be measured by its enormous financial and legal stakes. The decision below overturned a substantial bench verdict, *cf. Commissioner v. Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 & n.5 (1977) (certiorari granted in part because "substantially more than $100 million is in dispute"), and other pending cases with billions of dollars in liability at stake will also turn on the legal significance of the FTC's actions, *see, e.g.*, Memorandum and Order at 154-63, *Schwab v. Philip Morris USA, Inc.*, No. 04-CV-1945 (JBW) (E.D.N.Y. Sept. 25, 2006) (certifying a class seeking $200 billion in damages from cigarette makers, including Philip Morris, but sending defendants' so-called "FTC defense" to the jury).

More importantly, the citizens of Illinois now have no effective recourse against Philip Morris for its fraud under Illinois deceptive-practices statutes. *Cf. Kansas v. Marsh*, 126 S. Ct. 2516, 2531 (2006) (Scalia, J., concurring) (certiorari is proper "[w]hen state legislation is thwarted . . . on the basis of a questionable application of [federal] laws"). The interest of Illinois citizens, and citizens of other States, in remedying decades of fraudulent behavior by Philip Morris is on par with the interest of the United

States in pursuing lengthy and costly litigation against Philip Morris for the very same acts. Given the numerous pending suits against Philip Morris that will benefit from this Court's guidance, resolution of this important federal question should not wait.

2. This decision also has broad implications outside the tobacco context. The FTC's "economic regulatory activities affect virtually every business in the country, from local furniture stores to 'Fortune 500' corporations." Kanwit-*FTC* § 1:1, at 1-1. In addition, "[t]he majority of matters initiated by the [FTC] are settled by negotiation through prescribed consent order procedures." *Id.* § 12:1, at 12-1. Given the large number of States with deceptive-practices statutes that exempt conduct authorized by federal law, the question whether an FTC consent order constitutes federal authorization for a non-party to engage in conduct shielded from state-law liability is of broad and recurring significance. *See* Schwartz & Silverman, 54 U. Kan. L. Rev. at 31 n.160 (state regulatory-authorization exemptions "may rise in importance, particularly in private consumer protection litigation involving highly regulated industries, following the Illinois Supreme Court's decision in *Price*").

3. The United States also has considerable interests in avoiding dismissals of deceptive-practices claims, whether brought by consumers or state Attorneys General, based on nothing more than a negotiated FTC consent order. The decision below puts the FTC in the untenable position of rendering toothless state-law deceptive-practices remedies that have long served as a crucial complement to federal enforcement whenever it elects to settle an enforcement action. Such a result directly contravenes congressional mandate and FTC policy encouraging effect state remedies. *See* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 13, 108 Stat. 1691, 1696-97 ("The [FTC] shall review its statutory responsibilities to identify those matters within its jurisdiction where Federal enforcement is particularly necessary or

desirable and those areas that might more effectively be enforced at the State or local level.").

Left uncorrected, the holding below will substantially undermine these objectives: an FTC settlement with one company will make state-law enforcement ineffective on an industry-wide basis, disrupting the regime of dual enforcement that Congress and the FTC have crafted to remedy deceptive consumer practices nationwide. Faced with that prospect, the FTC will need either to bring fewer enforcement actions or to dismiss cases that it would have otherwise settled via consent orders. As the FTC warned long ago, "a determination that consent orders are controlling precedents would severely limit the use of the consent settlement process." *In re Beatrice Foods*, 86 F.T.C. at 50.[13] That result will unnecessarily impair efforts to deter and remedy deceptive practices aimed at consumers.

D. This Case Is An Appropriate Vehicle To Resolve The Important Federal-Law Question Decided By The Illinois Supreme Court

Although the majority below reversed the trial court's determination that Philip Morris violated state law, the court's decision unmistakably turned on a determination of federal law. As in *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942), this Court may exercise its jurisdiction to review the federal-law question presented.

Standard Oil involved a dispute arising out of section 10 of the California Motor Vehicle Fuel License Tax Act, which made a state vehicle tax inapplicable "to any motor vehicle fuel sold to the government of the United States or any department thereof." *Id.* at 482. The plaintiff had sold gas to the United States Army Post Exchange. The California Supreme Court ruled that the Army Post Ex-

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[13] *See also* Kanwit-*FTC* § 12:6, at 12-25 to 12-26 ("The courts and FTC have construed consent orders as contracts rather than as binding judicial precedent, reasoning that any other interpretation would hamper the consent settlement process.") (footnote omitted).

change was not "the government" and therefore that the plaintiff could be taxed. *Id.* at 483. This Court granted certiorari and rejected the argument that the issue presented was one of state law. It acknowledged that, "[i]f the [California] court's construction of Section 10 of the Act had been based purely on local law, this construction would have been conclusive." *Id.* "But," the Court explained, "in deciding that post exchanges were not 'the government of the United States or any department thereof', the court did not rely upon the law of California. On the contrary, it relied upon its determination concerning the relationship between post exchanges and the government of the United States, a relationship which is controlled by federal law." *Id.* Thus, the Court concluded, "[i]t was upon a determination of a federal question . . . that the Supreme Court of California rested its conclusion that . . . sales to post exchange were not exempted from the tax." *Id.* Accordingly, the Court upheld its jurisdiction and determined that the state court had erred in interpreting federal law. *See id.* at 483-85.

This case is on all fours with *Standard Oil.* In determining that the FTC had "specifically authorized" Philip Morris's conduct through consent orders, the court below rested its decision, not on an analysis of Illinois law, but rather on an exegesis of federal law. On the basis of that study, the court concluded — albeit erroneously — that the FTC's 1971 and 1995 consent orders authorized "nonparties to the order to follow its directives." Pet. App. 70a-72a. That determination is unmistakably one of federal law, because federal law defines the legal purpose and effect of a consent order entered into by a federal agency. This Court has repeatedly exercised its jurisdiction to resolve when an agency's action constitutes legal regulation, with all of the attendant legal effects. *See United States v. Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001) (collecting cases); *cf., e.g., Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (addressing whether opinion letter constitutes regulation warranting deference

under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

The federal-law element of the decision below is made clear by the court's exclusive reliance on federal authorities and FTC statements to resolve whether an FTC consent order constitutes legal authorization for non-parties. *See supra* p. 8. Indeed, the court acknowledged that the only way to determine the purpose and effect of consent orders was "to delve deeply into the functions and actions of a federal agency" and to "look to the affirmative acts or expressions . . . by the FTC." Pet. App. 67a.

The jurisdictional analysis here is not altered by the Illinois Supreme Court's statement that it "resolved the present case entirely on the basis of state law by construing and applying an exemption clause in a state statute." *Id.* at 87a. That statement is accurate only in the sense that the ultimate issue in the case was whether Philip Morris was subject to liability under the applicable state statute. If that were the appropriate jurisdictional standard, this Court could not have decided *Standard Oil*. What matters for jurisdictional purposes is that, in order to resolve the underlying state-law issue, the Illinois court was forced to decide a pivotal issue of federal law. *See Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 816 (1986) ("[T]his Court retains power to review the decision of a federal issue in a state cause of action."); *see also Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2366-70 (2005). The court itself acknowledged repeatedly that the federal-law issue was in fact "dispositive." Pet. App. 64a. As the majority below explained, "[t]he question for this court is whether the entry of a consent order, expressly directing one industry member to behave in a certain way, is an implicit authorization for other industry members to conduct themselves in the same manner." *Id.* at 70a; *see also id.* at 85a ("the question [is] whether the FTC has specifically authorized the use of these terms [*i.e.*, 'light' and 'low tar']"). Likewise, the court's decisive holding amounted to an undis-

guised conclusion of federal law: "a consent order entered into by the FTC with one member of a regulated industry, which is published pursuant to statute, provides implied authority for other members of the regulated industry to engage in the same conduct." *Id.* at 86a.

Under *Standard Oil*, this Court has jurisdiction to correct the Illinois court's erroneous view of a significant concept of federal law. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 565 (1985) (explaining that *Standard Oil* stands for the proposition that the Supreme Court may review a "question of state law [that] turns on a question of federal law").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2, 2006

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SUPREME COURT OF ILLINOIS

No. 96236

SHARON A. PRICE, ET AL.,
Appellees,

v.

PHILIP MORRIS, INC.,
Appellant.

[Dec. 15, 2005]

[Dissenting Opinion Upon Denial of Rehearing May 5, 2006]

Justice GARMAN delivered the opinion of the court:

After a bench trial in the circuit court of Madison County, the court found defendant, Philip Morris USA, Inc. (PMUSA) (formerly known as Philip Morris, Inc.), liable for fraud in violation of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 1998)), and the Uniform Deceptive Trade Practices Act (Deceptive Practices Act) (815 ILCS 510/1 *et seq.* (West 1998)), and awarded the estimated 1.14 million members of the plaintiff class compensatory and punitive damages, attorney fees, and prejudgment interest totaling $10.1 billion. We ordered that PMUSA's appeal be taken directly to this court pursuant to Supreme Court Rule 302(b) (134 Ill.2d R. 302(b)).

We have permitted the Chamber of Commerce of the United States and the Illinois Chamber of Commerce; the National Association of Manufacturers and the Illinois Manufacturers' Association; and the Product Liability Advisory Council, Inc., to file briefs *amici curiae* on behalf of the defendants. We have also permitted Public Citizen, Inc., along with various public health organizations;

economists Robert Solow and George Akerlof; the Trial Lawyers for Public Justice, along with various consumer advocacy groups; the American Medical Association, along with numerous medical societies; and the Citizens' Commission to Protect the Truth to file briefs *amici curiae* on behalf of the plaintiffs. 155 Ill.2d R. 345. In addition, 11 Illinois law schools that, depending on the outcome of this appeal, may receive some of the proceeds of the punitive damages award have been permitted to intervene. 735 ILCS 5/2-408 (West 2002).

We now reverse the judgment of the circuit court on the basis that this action is barred by section 10b(1) of the Consumer Fraud Act (815 ILCS 505/10b(1) (West 2000)).

I. BACKGROUND

A. History of FTC Regulation of the Cigarette Industry

The immense documentary record reveals the following industry history, which is essentially undisputed.

The FTC's jurisdiction over the advertising and testing of cigarettes is premised on the Federal Trade Commission Act, section 45(a) of which declares unlawful: "unfair methods of competition in or affecting commerce, and unfair and deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a) (2000). As early as the 1930s, the FTC took action against tobacco companies that made unsupported claims about the health benefits of smoking their particular brand of cigarettes. See, *e.g.*, *Julep Tobacco Co.*, 27 F.T.C. 1637 (1938).

In September 1955, the FTC issued its first Cigarette Advertising Guidelines, which permitted cigarette manufacturers to make claims regarding tar and nicotine yields, but only if they could substantiate their claims by "competent scientific proof":

> "No representation, claim, illustration, or combination thereof, should be made or used which directly or indirectly:
>
> 2. Represents that any brand of cigarette or the smoke therefrom is low in nicotine or tars, acids,

resins, or other substances, by virtue of its ingredients, method of manufacture, length, added filter, or for any other reason or without any assigned reason, than any other brand or brands of cigarettes when it has not been established by competent scientific proof applicable at the time of dissemination that the claim is true and, if true, that such difference or differences are significant.

Note: Words, including those relating to filtration, which imply lesser substances in the smoke, through filter comparisons or otherwise, are considered subject to this guide." 6 Trade Reg. Rep. (CCH) par. 39,012 (1988) (FTC Release, September 22, 1955, entitled "Guides").

Different manufacturers used different testing methods, however, making cross-brand comparison unreliable. In late 1959, the FTC Bureau of Consultation issued an industrywide advisory stating that "all representations of low or reduced tar or nicotine, whether by filtration or otherwise," would be construed as health claims. The purpose of the advisory and the accompanying demand for prompt compliance by the tobacco industry was to "eliminate from cigarette advertising representations which in any way imply health benefit." Letter of William H. Brain, Attorney, FTC Bureau of Consultation (December 17, 1959). The FTC indicated its intent to take enforcement action against cigarette manufacturers making such representations, effectively banning advertising regarding tar and nicotine levels. See 3 Trade Reg. Rep. (CCH) par. 7853.51, at 11,730 (1988) (reporting that, in 1960, FTC and the tobacco industry reached an agreement that the companies would refrain from advertising tar and nicotine content).

In 1964, Dr. Luther Terry released the groundbreaking Report of the Surgeon General's Advisory Committee on Smoking and Health. The Report concluded that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate

remedial action." Department of Health, Education, and Welfare, U.S. Surgeon General's Advisory Committee, Smoking and Health, at 33. Later that same year, the FTC promulgated a trade regulation rule defining it an unfair and deceptive act within the meaning of section 5 of the FTC Act to "fail to disclose, clearly and prominently, in all advertising and on every pack, box, carton or other container in which cigarettes are sold to the consuming public that cigarette smoking is dangerous to health and may cause death from cancer or other diseases." Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed.Reg. 8324, 8325 (1964).

Congress' enactment in 1965 of the Federal Cigarette Labeling and Advertising Act (Labeling Act) (Pub.L. 89-92, 79 Stat. 282, codified at 15 U.S.C. § 1331 *et seq.* (2000)), contained a preemption provision that vacated the newly promulgated trade regulation rule. The Labeling Act served two purposes. First, it was intended to inform the public of the hazards of smoking. Second, it was designed to address the emerging problem of inconsistent state regulation of cigarette labeling and advertising. Pub.L. 89-92, § 2. The Labeling Act required manufacturers to place a specific warning label on all cigarette packs. Pub.L. 89-92, § 4. The Act also required both the Secretary of Health, Education, and Welfare and the FTC to make annual reports to Congress on the health consequences of smoking and the advertising and promotion of cigarettes. Pub.L. 89-92, § 5. (The content of the warning was subsequently revised on two occasions: in 1969, when the Labeling Act was amended by the Public Health Cigarette Smoking Act (Pub.L. 91-222, 84 Stat. 87 (1969)), and in 1984, when the Labeling Act was again amended by the Comprehensive Smoking Education Act (Pub.L. 98-474, 98 Stat. 2200 (1984)). Prior to the adoption of the 1984 revisions, both the FTC and the Surgeon General recommended to Congress that the required warnings address the phenomenon of compensation, which refers to smokers' alteration of smoking behavior to achieve their accus-

tomed level of nicotine consumption. This recommendation was not adopted by Congress.)

In 1966, the United States Public Health Service reported that scientific evidence strongly suggested that the lower the levels of tar and nicotine in cigarette smoke, the less harmful the effects on the health of the smoker. United States Department of Health and Human Services, The Health Consequences of Smoking: The Changing Cigarette, at i (1981) (quoting 1996 statement by Public Health Service). Later that same year, the FTC announced that it had sent letters to each of the major United States cigarette manufacturers ending the ban on including tar and nicotine content on labels and in advertising of cigarettes. The letters stated:

> "The Cigarette Advertising Guides promulgated by the Commission in September 1955 provided that no representation should be made that any brand of cigarette or the smoke therefrom is low in nicotine or tars * * * when it has not been established by competent scientific proof applicable at the time of dissemination that the claim is true, and if true, that such difference or differences are significant. On the basis of the facts now available to it, the Commission has determined that a factual statement of the tar and nicotine content (expressed in milligrams) of the mainstream smoke from a cigarette would not be in violation of such Guides, or of any of the provisions of law administered by the Commission, so long as (1) no collateral representation (other than factual statements of tar and nicotine contents of cigarettes offered for sale to the public) are made, expressly or by implication, as to reduction or elimination of health hazards, and (2) the statement of tar and nicotine content is supported by adequate records of tests conducted in accordance with the Cambridge Filter Method. . . . It is the Commission's position that it is in the public interest to promote the dissemination of truthful infor-

mation concerning cigarettes which may be material and desired by the consuming public." 6 Trade Reg. Rep. (CCH) par. 39,012.70 (1988).

When public concern about the health effects of smoking began to increase, the FTC determined that it might be desirable for consumers to be able to choose among cigarette brands based on their yield of tar and nicotine. In support of this goal, the FTC, in 1967, adopted the "Cambridge Method" (FTC method) as the single acceptable means of measuring tar and nicotine yields in cigarettes. The record is clear that both the FTC and the cigarette manufacturers were aware at that time that no method of measurement, including the FTC method, could accurately predict the actual exposure of individual smokers who smoked any particular brand of cigarette. The variations in smoking habits, including the phenomenon of compensation, are simply too complex to account for in any uniform test. However, despite this awareness that the test data would not be accurate as to any individual smoker, the FTC found this concern outweighed by the need for a basis for comparison among brands. Thus, the FTC method was adopted for the purpose of providing a consistent benchmark, not as a means of measuring the actual exposure of individual smokers to tar and nicotine. FTC Press Release-Statement of Considerations 2 (August 1, 1967).

The FTC later declared that a manufacturer's use of tar and nicotine measurements based on the FTC method would be deemed substantiated and would not result in any regulatory action. Eventually, the FTC authorized cigarette manufacturers to include in their advertising a statement of the tar and nicotine content of their cigarettes, expressed in milligrams, as measured by the FTC method. Indeed, the FTC itself presented these measurements in its reports to Congress and published the data for circulation to consumers. 4 Trade Reg. Rep. (CCH) par. 39,012.70. See also Letter from Federal Trade Commission to major cigarette manufacturers and to

Robert. B. Meyner, Administrator of the Cigarette Advertising Code (March 25, 1966).

The FTC made its first Report to Congress, pursuant to the Labeling Act, in 1967. In that report, the FTC recommended that Congress strengthen the language of the warning statement that was then required on all cigarette packages. The warning statement stated that cigarette smoking "may be hazardous" to health. The FTC recommended a more direct statement that smoking is hazardous to health. The FTC also recommended that a "statement setting forth the tar and nicotine content of each cigarette should be required to appear on the package and in all cigarette advertising." Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, at 30 (June 30, 1967). The recommendations were not adopted at that time.

In its 1968 Report to Congress, the FTC responded to the emerging consensus regarding the possible benefit to smokers of reducing tar and nicotine yields. "Based upon the proposition that lower yield cigarettes present a lessened hazard to the American public," the Commission explained, it had acted during the previous year to: "(1) augment information available to the public on the tar and nicotine content of cigarettes and (2) prompt cigarette manufacturers to develop less hazardous cigarettes." Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, at 17 (June 30, 1968). However, the FTC observed:

> "An analysis of sales data provided by cigarette manufacturers indicates that sales of comparatively low yield cigarettes, e.g., *for purposes of this report only*, those having 15 milligrams (mg.) of tar or less, have not been extensive thus far. Three categories of cigarettes, classified according to tar yields, divided the market in 1967 as follows: 15 mg. and under-2%; 16-21 mg.-59%; 22 mg. and over-39%." (Emphasis added.) Federal Trade Commission, Re-

port to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, at 19 (June 30, 1968).

The 1968 report also reported that only a small number of companies were making voluntary tar and nicotine disclosures on their packaging, despite there being "every reason to believe that the promotion of low tar and nicotine yield cigarettes can be profitable." Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, at 19 (June 30, 1968). "[R]ather than alert smokers to less hazardous low yield cigarettes, advertisers sought for the most part to allay smoker anxiety by proclaiming the wonders of their filters." Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, at 19 (June 30, 1968).

In its 1969 Report to Congress, the FTC continued to press for mandatory disclosure of tar and nicotine content on each cigarette package and in all cigarette advertising and for stronger warnings. In addition, the FTC urged repeal of the Labeling Act and a complete ban on cigarette advertising on television and radio. Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, at 35 (June 30, 1969). Congress did not adopt these recommendations.

A subsequent FTC proposal that would have declared it an unfair or deceptive practice under section 5 of the FTC Act for cigarette manufacturers to fail to disclose in their advertising the tar and nicotine content of the product, based on the most recent FTC test results (see 35 Fed. Reg. 12,671 (August 8, 1970)), was dropped after five major industry members and three of the smaller companies voluntarily agreed to provide this information on all cigarette packages (see 36 Fed.Reg. 784 (1971)). See also Federal Trade Commission, Report to Congress Pursuant to the Public Health Cigarette Smoking Act, at 18-19 (December 31, 1970).

The voluntary approach was seen by the FTC as a more efficient means of accomplishing its goal. As then-

chairman Fitzpatrick said, "Trade regulation rules, if contested in the courts, might take a long time to become effective. A workable voluntary plan by the industry could be put into effect immediately." (As late as 1997, the voluntary agreement remained in effect. See Cigarette Testing; Request for Public Comment, Federal Trade Commission, 62 Fed.Reg. 48,158 (September 12, 1997). Nothing in the record suggests that the agreement has been terminated since that date.) As a result of this voluntary agreement, PMUSA and the other major manufacturers of cigarettes have, since 1971, included information on tar and nicotine yields as measured by the FTC method on packaging and in advertising. See Federal Trade Commission, Staff Report on the Cigarette Advertising Investigation, May 1981, at 4-5.

The descriptor "low tar" began to appear in cigarette advertising by the late 1960s as the industry responded to public interest in lowered tar and nicotine by adopting innovations, such as the use of filters, aeration holes, or wrapping paper that burned more quickly. Each of these innovations caused reductions in the amounts of tar and nicotine measured by the FTC method. As noted above, the FTC and industry members were well aware that the FTC method did not replicate actual smoking behavior. They were also aware that smokers who switched from a brand that was higher in tar and nicotine to a brand with one of these features tended to compensate by smoking more cigarettes or by smoking differently.

In 1969, the FTC informed cigarette manufacturer American Brands of its intent to charge the company with engaging in unfair, misleading, and deceptive advertising with respect to the tar content of its Pall Mall and Lucky Strike cigarettes. (American Brands, Inc., was formed in 1969 as the parent company of the American Tobacco Company, which traced its corporate roots to the founding of W. Duke & Sons in North Carolina in 1864.)

Shortly thereafter, but before a formal complaint was filed, the Code Authority of the National Association of

Broadcasters sought an advisory opinion from the FTC. See 16 C.F.R. § 1.1 (permitting any person, partnership, or corporation to request advice from the FTC "with respect to a course of action which the requesting party proposes to pursue"). By letter to the FTC, the Code Authority inquired whether the FTC had formulated a policy regarding the use of words such as "low," "lower," and "reduced" in describing the level of tar and nicotine in cigarettes. *American Brands, Inc.*, 77 F.T.C. 1623, 1970 WL 117288 (1970). The FTC responded, by letter, that "the use of 'low' and 'less' or similar words when describing tar and nicotine content, create[s] an imprecise picture, which, absent a full and fair disclosure, could lead to a mistaken conclusion that the advertised brand is lower in tar and nicotine than many other brands." *American Brands, Inc.*, 77 F.T.C. at 1624. The FTC also stated that the "degree of imprecision created would vary," depending on what representations were being made and the actual tar and nicotine levels of the advertised cigarette, but that "imprecision could almost always be avoided" if "clear and conspicuous disclosure" was made of the tar and nicotine content, in milligrams, of the advertised cigarette, that brand to which it was being compared, and the domestic cigarettes with the highest and lowest yields. *American Brands, Inc.*, 77 F.T.C. at 1624. The FTC further advised the Code Authority that all representations regarding tar and nicotine levels in cigarette advertising should be based on recent test results. Finally, because the topic was of substantial public interest, the exchange of correspondence between the FTC and the Code Authority was made public. *American Brands, Inc.*, 77 F.T.C. at 1624.

On April 1, 1970, the Public Health Cigarette Smoking Act became law, making several significant changes to the Labeling Act. Pub.L. 91-222, 84 Stat. 87 (1969). First, since November 1970, all cigarette packages have been required to carry the following warning statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." Pub.L. 91-222, § 4. Second, since January 2, 1971, the Public Health

Cigarette Smoking Act has barred cigarette advertising from television and radio. Pub.L. 91-222, § 6. And, third, a new preemption provision forbids any "requirement or prohibition based on smoking and health * * * imposed under State law with respect to the advertising or promotion of cigarettes." Pub.L. 91-222, § 5(b). As the new preemption provision was directed only at actions by the states, the FTC remained free to regulate cigarette advertising. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 545, 121 S.Ct. 2404, 2416-17, 150 L.Ed.2d 532, 553 (2001).

In its 1970 Report to Congress, the FTC described the exchange with the Code Authority under the heading "Voluntary Regulation." The FTC reported that the Code Authority had "adopted as its policy a position similar to the order" that the FTC "believed to be appropriate" as a resolution of its pending complaint against American Brands. The FTC's clearly stated policy was that:

> "if a broadcast cigarette advertisement used comparative language such as 'low' or 'lower' to describe the tar and nicotine content of the advertised cigarette, the advertisement must also disclose:
>
> 1. The tar and nicotine content in milligrams of the advertised cigarette;
>
> 2. The tar and nicotine content in milligrams of the lowest and highest yield domestic cigarettes; and
>
> 3. If the tar and nicotine content of the advertised cigarette is compared to any other specific cigarette, the brand name and tar and nicotine content in milligrams of the smoke produced by such other cigarettes." Federal Trade Commission, Report to Congress Pursuant to the Public Health Cigarette Smoking Act, at 21 (December 31, 1970).

One result of the advisory opinion rendered to the Code Authority, according to the Report, was that several television commercials had been withdrawn and that only two brands made comparative claims in broadcast advertise-

ments during 1970. Federal Trade Commission, Report to Congress Pursuant to the Public Health Cigarette Smoking Act, at 21 (December 31, 1970).

Subsequently, when the formal complaint against American Brands was filed, the FTC accused the company of creating the false impression that its cigarettes were low in tar when, in fact, Pall Mall Gold 100s and Lucky Filters contained approximately 20 and 21 milligrams of tar, respectively, at a time when the brand containing the lowest level of tar contained only 4 milligrams. *In re American Brands, Inc.*, 79 F.T.C. 255, 1971 WL 128779 (1971). By this time, the voluntary agreement had been reached, but American Brands had not signed on to it.

The dispute between the FTC and American Brands was resolved in 1971, with the entry of a consent order that required American Brands to cease and desist from:

> "Stating in advertising that any cigarette manufactured by it, or the smoke therefrom is low or lower in 'tar' by use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms, unless the statement is accompanied by a clear and conspicuous disclosure of:
>
> 1. The 'tar' and nicotine content in milligrams of the smoke produced by the advertised cigarette; and
>
> 2. If the 'tar' content of the advertised brand is compared to that of another brand or brands of cigarette, (a) the 'tar' and nicotine content in milligrams of the smoke produced by that brand or those brands of cigarette, and (b) the 'tar' and nicotine content in milligrams of the lowest yield domestic cigarette." *American Brands*, 79 F.T.C. at 255.

The consent order further defined the term "tar" as "the total particulate matter in the mainstream smoke of cigarettes as determined by the testing method employed by the Federal Trade Commission in its testing of the smoke of domestic cigarettes." *American Brands*, 79 F.T.C. at 255.

The content of the consent order was slightly different from that of the order the FTC anticipated in its 1970 Report to Congress. Significantly, the FTC originally intended to require that any claim of low or lower tar be accompanied not only by the tar and nicotine content in milligrams, but also by the tar and nicotine content of the lowest yield domestic cigarette. See Federal Trade Commission, Report to Congress Pursuant to the Public Health Cigarette Smoking Act, at 21 (December 31, 1970). In the end, the order allowed the use of the words "'low,' 'lower,' or 'reduced' or like qualifying terms," so long as the tar and nicotine content of the cigarette being advertised was clearly and conspicuously disclosed. Only if the advertised brand was being compared to another specific brand or brands of cigarettes was the manufacturer required to disclose the additional information.

Later in 1971, after having reached a voluntary agreement with most cigarette manufacturers to disclose tar and nicotine levels in their advertising (and having obtained the compliance of American Brands and other nonsigners through the 1971 consent order), the FTC announced its intention to file complaints against six cigarette companies if they failed to display in their advertising, clearly and conspicuously, the same warning that Congress had already required on cigarette packages. Again, negotiations between the FTC and the major cigarette manufacturers resulted in the entry of a consent order. *In re Lorillard*, 80 F.T.C. 455, 1972 WL 128702 (1972). (In 1975, the FTC sought civil penalties against the six major cigarette manufacturers for violations of these consent orders). See *United States v. R.J. Reynolds Tobacco Co.*, No. 76 Civ. 813(JMC), 1981 WL 2027 (S.D.N.Y., February 20, 1981) (disposing of last remaining enforcement action after five other companies entered into consent judgment approved by the FTC).

In its 1971 Report to Congress, the FTC described the resolution of the American Brands dispute via consent order as part of its "[r]egulatory activity" for the year.

Federal Trade Commission, Report to Congress Pursuant to the Public Health Cigarette Smoking Act, at 13-14 (December 31, 1971). In addition, the FTC reported under the heading of "Regulatory activity" its "extended negotiations" with "six proposed respondents" in the *Lorillard* matter. Settlement by consent order would "meet the public interest in this matter" and would "take effect much sooner than orders resulting from adjudicative proceedings." Such orders, the FTC observed, would "carry the force of law" and violation of the orders could carry civil penalties. The FTC did not comment on the effect or application of the orders on companies that were not parties thereto. Federal Trade Commission, Report to Congress Pursuant to the Public Health Cigarette Smoking Act, at 16 (December 31, 1971).

By the early 1970s, in addition to including the tar and nicotine content numbers in their packaging and advertising in accordance with the voluntary plan and the 1971 and 1972 consent orders, several manufacturers were advertising their products as being "low" or "lower" in either or both tar and nicotine. Vantage, True, and Doral, for example, were advertised as low tar and nicotine cigarettes. Pall Mall Extra Mild, Silva Thins, Pall Mall Gold 100s, Lucky Ten, Carlton, and Iceberg 10 were advertised as low or lower in tar. Federal Trade Commission, Report to Congress Pursuant to the Public Health Cigarette Smoking Act, at 5 (December 31, 1973). In its 1974 Report to Congress, the FTC noted that "as the manufacturers of Raleighs, Kools, Pall Malls, Viceroy's and Marlboros are doing, Winston now offers a Winston Light with lowered 'tar' and nicotine content." Federal Trade Commission, Report to Congress Pursuant to the Public Health Cigarette Smoking Act, at 5 (December 31, 1974).

By 1978, the FTC was reporting to Congress that low tar cigarettes, which it defined as those with 15 milligrams or less of tar, had increased in market share from 2% in 1967 to 28% in 1978. Federal Trade Commission, Report to Congress Pursuant to the Public Health Ciga-

rette Smoking Act, at 3 (1978). In addition, the FTC noted that "[m]arketing shifts to lower 'tar' and nicotine cigarettes may be another way of assessing the effects of health warnings." The increasing market share of the low tar brands was seen as an indication that the public health message was reaching consumers. The FTC also noted, however, that "[w]hile there is evidence suggesting that cigarettes with lower 'tar' and nicotine are less hazardous, the evidence is not conclusive and even the lowest yield of cigarettes presents health hazards much higher than would be encountered without smoking at all." Federal Trade Commission, Report to Congress Pursuant to the Public Health Cigarette Smoking Act, at 3 (1978).

By 1979, the FTC was reporting that the market share of low tar cigarettes had increased to 40.9%. Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, at 8 (1979). In this report, the FTC provided data on the total advertising expenditures and market shares for cigarettes with 15, 12, 9, 6, and 3 milligrams of tar. The report noted that advertisers sometimes described cigarettes with 3 milligrams or less of tar as "ultra low 'tar.'" Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, at 11 (1979). In a footnote, the FTC stated that it had not defined "'ultra-low tar', or any term related to 'tar' level except for 'low tar', which the FTC defines as 15.0 mg. or less tar." Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, 1979, at 11 n.8 (1979). "As a result," the FTC observed, "advertisers use a variety of terms to distinguish among 'tar' levels." Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, at 11 n.8 (1979). (An identical footnote appeared in the FTC's 1980 Report to Congress). Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, at 11 n.8 (November 15, 1982).

The FTC also employed the term "low 'tar' " when it issued a press release on December 15, 1981, announcing the release of a report entitled "Report of 'Tar,' Nicotine and Carbon Monoxide of the Smoke of 200 Varieties of Cigarettes." The lead paragraph in the press release stated that "Test results released today by the Federal Trade Commission show an increase in the number of cigarettes with low 'tar,' nicotine and carbon monoxide levels." In addition, the report showed that 150 of the 200 brands tested had 15 milligram or less tar, compared to 125 of 187 brands tested the previous May. FTC Press Release-FTC Cigarette Report Shows More Brands on Market with Low "Tar," Nicotine, Carbon Monoxide Levels (December 15, 1981).

Over the years, the FTC conducted multiple investigations regarding the use of tar and nicotine levels and of descriptors such as "lights" and "low tar" in cigarette advertising. Such investigations took place in 1976, 1981, 1988, and 1992.

In 1981, the FTC concluded that the warning on cigarette packages and in cigarette advertising was not effective and did not provide sufficient information to consumers regarding the health risks of smoking. Federal Trade Commission, Staff Report on the Cigarette Advertising Investigation, May 1981, at 4-7. The staff report concluded that even though warnings and disclosure of FTC test measurements of tar and nicotine were required by the FTC, the then-current state of cigarette advertising might be deemed deceptive under section 5 of the FTC Act because a substantial segment of the purchasing public was likely to be deceived. Federal Trade Commission, Staff Report on the Cigarette Advertising Investigation, May 1981, at 4-17. This conclusion was based on data in the report indicating that a large portion of the public lacked sufficient knowledge of the hazards of cigarette smoking. Federal Trade Commission, Staff Report on the Cigarette Advertising Investigation, May 1981, at 4-21, 4-36. The Commissioners unanimously agreed that this

staff report should be transmitted to Congress. With only one Commissioner objecting, the staff report was released to the public. The entire Commission endorsed the substance of the report. See letter from David A. Clanton, Acting Chairman of the FTC, to George Bush, Vice President (May 21, 1981) (transmitting the staff report to the Senate). Nevertheless, neither the FTC nor Congress acted upon this staff suggestion that cigarette advertising under the then-current FTC policy and regulations should be deemed deceptive.

Also in 1981, the FTC began an investigation of Barclay cigarettes. The investigation was triggered by complaints from manufacturer Brown & Williamson's competitors, who claimed that the design of the Barclay filter caused it to falsely register very low tar measurements on the FTC smoking machine. *Federal Trade Comm'n v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C.Cir.1985). The FTC determined that the Barclay claim of 1 milligram of tar was false and deceptive and attempted to require Brown & Williamson (B & W) to state an estimated tar content of 3 to 7 milligrams. B & W refused, but changed its advertisements to state that the 1 milligram tar measurement was obtained using a method recognized by "independent laboratories." *Brown & Williamson*, 778 F.2d at 38. The FTC thereafter sought an injunction to prevent such advertising and the district court granted injunctive relief. The Court of Appeals, although affirming the finding that B & W violated section 5 of the FTC act (*Brown & Williamson*, 778 F.2d at 43), reversed on first amendment grounds (*Brown & Williamson*, 778 F.2d at 45).

After the 1988 investigation, the FTC recommended to Congress that it not adopt a proposed amendment to the Labeling Act that would have permitted states to impose additional duties with respect to such advertising. The FTC argued that allowing individual states to impose their own rules would conflict with the FTC program.

In the 1992 investigation, the FTC considered whether the use of terms such as "low tar" and "light" in cigarette advertising should be banned because they were deceptive, given what was known about the limits of the FTC method and the real world phenomenon of compensation by smokers. The FTC concluded, however, that if the use of such terms was substantiated by FTC method results, they were not false, unfair, or misleading under the provisions of the FTC Act.

In the course of at least two of the investigations, the FTC reexamined the test method and considered whether the protocol should be changed to render it a more accurate representation of human behavior, given the changes in cigarette design. In both cases, the FTC solicited public comment on the FTC method. The first reexamination occurred in 1977 and was triggered by the suggestion of Lorillard, Inc., that the protocol of the FTC method be changed so that the cigarette being tested would not be inserted quite as far into the machine. Lorillard's concern was that when its cigarettes were inserted to the prescribed depth, the machine blocked the ventilation holes, resulting in a higher tar and nicotine rating than if the holes had remained uncovered. In the end, Lorillard was the only industry member to advocate altering the standard insertion depth. The FTC concluded that the protocol should not be changed. The agency reiterated its 1967 statement that the purpose of the testing was not to predict the tar and nicotine exposure of any individual smoker but, rather, to determine the amount of tar and nicotine generated when the cigarette was smoked by a machine under a prescribed protocol. 43 Fed.Reg. 11,856 (March 22, 1978). Noting that innovations such as aerated filters had complicated the task of providing comparability among cigarette brands, the FTC concluded that "a change in the insertion depth would cause a lack of continuity with previous test results." 43 Fed.Reg. 11,856-57 (March 22, 1978). Further, the FTC noted that if a consumer "smoked each different cigarette the same way, he would inhale 'tar' and nicotine in amounts pro-

portional to the relative values of the FTC figures." 43 Fed.Reg. 11,856 (March 22, 1978). Thus, "in the absence of information indicating that a new insertion depth would be me more consistent with the manner in which smokers insert cigarettes in actual use," the FTC decided not to modify the protocol. 43 Fed.Reg. 11,857 (March 22, 1978). In the end, the FTC concluded this investigation by issuing an advisory opinion stating that the tar values set forth in cigarette advertisements must be consistent with the latest applicable FTC tar number, based on the FTC methodology, and that any tar and nicotine claims not so substantiated were not permitted. See *In re Lorillard*, 92 F.T.C. 1035, 1978 WL 206080 (1978).

The second reexamination of the FTC method occurred in the early 1980s, when some manufacturers began using channel ventilation systems rather than air holes. The channels remained open when the cigarette were inserted in the machine, yielding very low numbers. Competitors complained that the results were inaccurate because the channels did not remain open when the cigarette was in the hands of an actual smoker. In addition to initiating the Barclay investigation, noted above, the FTC invited public comment on this development and on possible modifications of its method that might render it a more accurate representation of actual smoking behavior. 48 Fed.Reg. 15,953-54 (April 13, 1983). The FTC also asked for comments on whether such modifications might result in unintended consequences or affect further innovation in cigarette design. 48 Fed.Reg. 15,954-55 (April 13, 1983). In addition, the FTC sought comment on the possibility of using a system of ranges or "bands" of tar content, as opposed to specific numerical values expressed in milligrams of tar. Finally, the FTC reiterated its longstanding position that its ratings were intended to be relative, not absolute, even as it posed the question: "should consumers be advised that the cigarettes' actual 'tar' delivery depends on how it is smoked?" 48 Fed.Reg. 15,955 (April 13, 1983).

Comments were received not only from those in the cigarette industry, but also from a number of health organizations. The opinions expressed were widely disparate, ranging from a call for development of a testing system that did approximate actual smoking behavior to a suggestion that all such testing be abolished. In response to the idea of a "banding" system, which would categorize cigarettes as high tar, medium tar, low tar, and ultra low tar, several manufacturers noted that this would tend to concentrate brands near the upper level of each range, in contrast to the existing system that gave manufacturers an incentive to create a product that would deliver the lowest possible level of tar. In the absence of a consensus on any means of eliminating or reducing the limitations of the FTC test method, the FTC made no changes to its testing methodology.

The issue of cigarette labeling and advertising rules remained status quo until February 27, 1992, when The Coalition on Smoking OR Health (made up of the American Heart Association, the American Lung Association, and the American Cancer Society), filed a petition with the FTC in which it sought the issuance of an administrative complaint against PMUSA and other tobacco companies pursuant to section 5 of the FTC Act. Specifically, the Coalition alleged that PMUSA's labeling and advertising of one of its low tar products and similar labeling and advertising by other manufacturers were false and misleading because the use of terms such as "low tar," "light," and "ultra low tar" falsely implied that these cigarettes were safer than other products. The Coalition charged that the failure of PMUSA and other manufacturers "to disclose that while the tar yield of their low tar cigarettes may be less than other tobacco-related products, there are numerous known carcinogens in the constituents of these tobacco products, carcinogens which pose a health hazard to the consumer," and that this failure to make such additional disclosures "is a material omission in violation of the Federal Trade Commission Act." Petition of The Coa-

lition on Smoking OR Health before the Federal Trade Commission, par. 25 (February 27, 1992).

The FTC responded to the Coalition's petition by means of a letter from C. Lee Peeler, the Associate Director of the FTC. Peeler's letter stated that after giving careful consideration to the questions raised in the Coalition's petition, the FTC had asked the National Cancer Institute (NCI) to convene a "consensus conference" on this topic. Letter from C. Lee Peeler to Matthew L. Myers, Counsel to Coalition on Smoking OR Health (August 8, 1994).

The National Cancer Institute Conference on the FTC Cigarette Test Method was also brought about by the request of Representative Henry A. Waxman, chairman of the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce, who asked the NCI to convene a conference to review the FTC's method of determining the relative tar and nicotine content of cigarettes. At the "direction of the Commission," the FTC chairman wrote to the NCI director, noting the substantial overlap between the issues identified by Chairman Waxman and those the FTC was then examining. The FTC chair asked that the consensus conference "provide a comprehensive review of the existing scientific evidence on issues relating to low-tar and ultra-low tar cigarettes." The letter further asked that the conference consider whether the "current rating system is sufficiently flawed as to pose harm to consumers who rely on the ratings." Among the list of specifically suggested topics for the conference, the letter listed:

> "are low-tar cigarettes (cigarettes rated at 15 mg. or less of tar) less dangerous than high-tar cigarettes (those rated at more than 15 mg. of tar) and, if so, what is the extent of their health benefit?"

and:

> "are ultra low-tar cigarettes (cigarettes rated at 6 mg. or less of tar) less dangerous than low-tar and/or high-tar cigarettes and, if so, what is the extent of their health benefit?"

Letter from Janet D. Steiger, FTC Chairman, to Samuel Broder, M.D., Director, National Cancer Institute (July 20, 1994).

The conference was held on December 5 and 6, 1994, in Bethesda, Maryland. The conferees concluded that yield numbers and descriptors of yield numbers, such as "light" and "ultra light," were health claims. They recommended that such numbers and descriptors in labeling and advertising be accompanied by appropriate disclaimers as to health consequences of smoking, but did not recommend banning such descriptors. See NCI Monograph 7: The FTC Cigarette Testing Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes (1996). The FTC, in the end, did not adopt a trade regulation rule or take other regulatory action to require such disclaimers for light and low tar descriptors.

In 1994, the FTC initiated an investigation into the practices of the American Tobacco Company, which by this time had been sold by its corporate parent, American Brands. American Tobacco was advertising its Carlton brand cigarettes by showing 10 packs of Carltons next to a single pack of another brand. The tar and nicotine ratings for each brand was shown, along with a claim that 10 packs of Carltons had less tar than one pack of the other brand. In other ads, the claim was made that an entire carton of Carltons had less tar than a single pack of the other brand. The FTC complaint alleged that these ads were false and misleading because consumers would not, in fact, get less tar by smoking 10 packs of Carlton than by smoking one pack of the other brands. Although the other cigarettes were, indeed, rated as having 10 times or more tar, measured in milligrams, than Carltons, "those ratings are obtained through smoking machine tests that do not reflect actual smoking, in part because the machines do not take into account such behavior as compensatory smoking." *In re American Tobacco Co.*, 119 F.T.C. 3, 1995 WL 17012576 (1995).

Again, the matter was resolved by agreement. American Tobacco agreed to abandon any representation of the tar and nicotine levels of Carlton cigarettes by using "a numerical multiple, fraction or ratio" of the tar or nicotine levels of other brands or by depicting more than one pack of Carltons versus one pack of any other brand. The agreed order provided, further, that "presentation of the tar and/or nicotine ratings of any of respondent's brands of cigarettes and the tar and/or nicotine ratings of any other brand (with or without an express or implied representation that respondent's brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine) shall not be deemed" to violate the ban on numerical comparisons. *American Tobacco*, 119 F.T.C. at 11. Prior to the entry of the agreed order, the FTC described this provision as a "limited 'safe harbor' for advertising that complies with certain requirements in its use of official tar and nicotine ratings." Analysis of Proposed Consent Order to Aid Public Comment, *In re American Tobacco Co.*, F.T.C. File No. 932 3368, 1994 WL 549037 (August 31, 1994).

Most recently, in 1997, the FTC solicited public comment on various proposals for altering the FTC testing method and for changing cigarette advertising so that it would more accurately reflect the limits of the testing method. The request for comment explained that the 1970 voluntary agreement between the FTC and most cigarette manufacturers "remains in effect today, and it forms the basis for current disclosure of tar and nicotine yield." The request for comment also raised the issue of compensation and noted the inability of the current testing method to allow for compensatory behavior by smokers. See Cigarette Testing: Request for Public Comment, Federal Trade Commission, 62 Fed.Reg. 48,158 (September 12, 1997). The record suggests that this inquiry is still ongoing.

B. PMUSA's Marlboro Lights and Cambridge Lights

Against this industry backdrop, in 1971, PMUSA responded to increasing consumer concerns about the health

effects of smoking by introducing Marlboro Lights cigarettes as an alternative to its Marlboro Reds. PMUSA began selling Cambridge Lights in 1986. In addition to the use of the word "light" in the names of these new products, which suggested that they were in some way "lighter" than their "full-flavored" counterparts, the Marlboro Lights label promised "lowered tar and nicotine."

Marlboro Lights became the most popular cigarette brand in the country and inspired many imitators. Light cigarettes, including the PMUSA brands, eventually constituted 89% of the United States cigarette market.

The tobacco contained in Marlboro Lights did not carry any less tar or nicotine than the tobacco in so-called "full-flavor" cigarettes. Instead, the claim of low tar and nicotine was premised on the use of a different type of filter, which was designed to dilute the smoke and to make it more difficult for the smoker to draw smoke, and therefore tar and nicotine, into his or her lungs. When subjected to testing by the FTC method, Lights indeed delivered less tar and nicotine.

In actual experience, however, smokers who changed from regular cigarettes to Lights were likely to compensate for the lower amount of nicotine delivered by the more restrictive filter by smoking more cigarettes, smoking them longer, taking more frequent drags as they smoked, or inhaling more deeply. As a result, many smokers of Lights likely inhaled just as much tar as they would have had they remained smokers of regular cigarettes.

C. Procedural History

1. *The Pleadings*

On February 10, 2000, plaintiffs, as individuals and on behalf of a class of similarly situated individuals, brought this lawsuit alleging violations of the Consumer Fraud Act and the Deceptive Practices Act. They did not seek damages for the health effects, if any, of their consumption of Lights. Instead, they sought only economic dam-

ages based on their claim of having purchased a product in reliance on statements by PMUSA that were fraudulent, deceptive, and unfair.

In response to plaintiffs' first amended complaint, PMUSA raised 27 separate affirmative defenses including *laches*, waiver, the statute of limitations, federal preemption, and the statutory exemption contained in section 10b(1) of the Consumer Fraud Act for conduct that is specifically authorized by a state or federal regulatory body (815 ILCS 505/10b(1) (West 1998)).

On February 11, 2003, plaintiffs filed their second amended complaint and a motion for withdrawal of three of the five named plaintiffs, which was granted by the circuit court.

The second amended complaint establishes the parameters of this litigation. The relevant factual allegations contained in plaintiffs' second amended complaint are:

> "7. At all relevant times, Defendant sold and packaged Cambridge Lights and Marlboro Lights as 'light' and as having decreased tar and nicotine.
>
> 8. While marketing and promoting decreased tar and nicotine deliveries, Defendant designed Cambridge Lights and Marlboro Lights cigarettes to register lower levels of tar and nicotine to the 'Cambridge' or 'Ogg' testing apparatus – the testing machine used by the tobacco industry to 'measure' tar and nicotine levels in cigarettes – than would be delivered to the consumers of the product. Defendant controlled the tar and nicotine delivery of Cambridge Lights and Marlboro Lights under machine testing conditions to achieve apparent support for their representations that their Cambridge Lights and Marlboro Lights cigarettes are 'light' and contain decreased tar and nicotine and that their Marlboro Lights cigarettes contain 'lowered tar and nicotine.'

9. Defendant's representation that Cambridge Lights and Marlboro Lights cigarettes are lower in tar and nicotine than regular cigarettes is deceptive and misleading.

10. Not only do consumers receive higher levels of tar and nicotine than the testing apparatus registers, the smoke produced by Cambridge Lights and Marlboro Lights is more mutagenic (causing genetic and chromosomal damage) per milligram of tar than 'regular' cigarettes."

Plaintiffs' second amended complaint further alleged the following "deceptive and unlawful conduct" by PMUSA in connection with its "manufacture, distribution, and marketing and sale of Cambridge Lights and Marlboro Lights cigarettes":

"a. falsely and/or misleadingly representing that their product is 'light' and/or delivers lowered tar and nicotine in comparison to regular cigarettes;

b. describing the product as light when the so-called lowered-tar and nicotine deliveries depended on deceptive changes in cigarette design and composition that dilute the tar and nicotine content of smoke per puff as measured by the industry standard testing apparatus, but not when used by the consumer.

c. intentionally manipulating the design and content of Cambridge Lights and Marlboro Lights cigarettes in order to maximize nicotine delivery while falsely and/or deceptively claiming lowered tar and nicotine. These manipulations include, but are not limited to, the modification of tobacco blend, weight, rod length, and circumference; the use of reconstituted tobacco sheets and/or expanded tobacco; and the increase of smoke pH levels by chemical processing and additives, such as ammonia, which resulted in the delivery of greater amounts of tar and nicotine when smoked under actual conditions than Defendant represented by use of the 'light' description;

d. employing techniques that purportedly reduce machine-measured levels of tar and nicotine in Cambridge Lights and Marlboro Lights cigarettes, while actually increasing the harmful biological effects, including mutagenicity (genetic and chromosomal damage) caused by the tar ingested by the consumer per milligram of nicotine."

In answer to the second amended complaint, PMUSA continued to assert the same 27 affirmative defenses.

2. *Class Certification and Class Representatives*

On September 8, 2000, plaintiffs moved for class certification pursuant to section 2-801 of the Code of Civil Procedure (735 ILCS 5/2-801 (West 1998)). A hearing on plaintiffs' motion for class certification was held on November 28, 2000, with a supplemental hearing on January 12, 2001.

On February 8, 2001, the circuit court granted plaintiffs' motion to certify a plaintiff class of consumers who purchased Cambridge Lights and Marlboro Lights in the State of Illinois for personal consumption between their introduction and February 8, 2001. Thus, the class period for purchases of Cambridge Lights was from 1986 to 2001; the class period for Marlboro Lights was from 1971 to 2001.

On July 7, 2002, PMUSA filed a motion to decertify the class based on this court's decision in *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134, 267 Ill.Dec. 14, 776 N.E.2d 151 (2002). In *Oliveira*, this court held that "to properly plead the element of proximate causation in a private cause of action for deceptive advertising brought under the Act," the plaintiff must allege that he was "in some manner" deceived by the advertisement. *Oliveira*, 201 Ill.2d at 155, 267 Ill.Dec. 14, 776 N.E.2d 151. The circuit court denied the motion to decertify the class, rejecting PMUSA's argument that class certification was improper because the question of deception was necessarily an individual question, not a common question of fact that could be determined for the class as a whole.

Notice of the class action was published in 21 newspapers, including the Chicago Tribune, the St. Louis Post-Dispatch, USA Today, and 18 regional Illinois newspapers. In addition, notice was given to the general public via the Internet and a press release to PR Newswire International Newslines Service. PMUSA's request that notice be given to individual Illinois residents whose names and addresses were available from its own database of consumers was denied.

PMUSA requested that the circuit court adopt a trial plan that would allow it to address the questions of actual deception, actual reliance, and other issues that, it argued, were individual issues. The circuit court rejected the proposed trial plan. Similarly, PMUSA's request to depose individual class members other than the named plaintiffs and those selected by plaintiffs' counsel was denied by the circuit court.

At the close of evidence, on March 10, 2003, PMUSA again moved for decertification of the class. In the final judgment order, the circuit court again found that class certification was proper because common issues of law and fact predominated. Specifically, "Philip Morris has engaged in a course of conduct that affects this Class in such a way that all members share various elements of this cause of action." The following factual issues were determined by the circuit court to be common to all members of the class:

> "a. whether Class members understood the descriptor 'lights' and 'lowered tar and nicotine' to mean less harmful, safer and/or delivering less tar;
>
> b. whether these representations were false and/or misleading to Class members;
>
> c. whether Defendant Philip Morris intended for the Class to rely upon these representations;
>
> c. [*sic*] whether Philip Morris's conduct violated the Illinois Commerce Fraud Act [*sic*] and whether this violation was willful and wanton; and

d. whether Class members sustained damage as a result of Philip Morris' deceptive conduct."

On appeal, PMUSA argues that the circuit court erred in certifying the class because of the predominance of individual issues. In particular, PMUSA questions whether it was proper for the circuit court to conclude that the elements of actual deception and reliance could be established for all members of the class. PMUSA argues that the expert testimony offered by plaintiffs on these issues could not and did not establish the existence of these facts as to every member of the plaintiff class.

In addition, PMUSA argues that the circuit court improperly applied the discovery rule to toll the running of the statute of limitations (815 ILCS 505/10a(e) (West 1998)). According to PMUSA, Consumer Fraud Act claims based on purchases that occurred more than three years prior to the filing of this lawsuit are barred by section 10a(e) of the Consumer Fraud Act. The discovery rule tolls the running of the limitations period with respect to claims that would have put a reasonable person on notice of the need to investigate "'whether actionable conduct is involved.'" *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill.2d 72, 86, 209 Ill.Dec. 684, 651 N.E.2d 1132 (1995), quoting *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 416, 58 Ill.Dec. 725, 430 N.E.2d 976 (1981). Thus, PMUSA asserts, application of the discovery rule to extend the class period beyond three years raises additional individual questions of fact regarding when individual class members were exposed to public information about the controversy regarding "light" and "low tar" cigarettes.

Plaintiffs respond that because the circuit court found each of the factual elements of the fraud claimed proven, PMUSA cannot now argue that the class certification was improper without demonstrating to this court that each of the court's factual findings was against the manifest weight of the evidence.

3. *Motion for Summary Judgment Based on PMUSA's Claims of Preemption and Exemption*

PMUSA filed a motion for summary judgment on its affirmative defenses of express and implied federal preemption and exemption from liability under sections 2 and 10b of the Consumer Fraud Act (815 ILCS 505/2, 10b (West 1998)).

On October 28, 2002, a hearing was held to consider PMUSA's motion for summary judgment. PMUSA argued that plaintiffs' claim is expressly preempted by the Federal Cigarette Advertising and Labeling Act, which provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with [this Act]." 15 U.S.C. § 1334(b) (2000). PMUSA also argued that under the Supreme Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), plaintiffs cannot base their claim on an allegation that defendant has neutralized the warning Congress requires on cigarette packages and, under *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001), plaintiffs' claim cannot be predicated on an alleged fraud upon the FTC. Based on the comprehensive federal regulatory scheme governing the labeling and advertising of cigarettes as well as the disclosure of tar and nicotine levels, PMUSA argued implied preemption.

PMUSA further argued that section 10b(1) of the Consumer Fraud Act "exempts conduct that complies with federal laws or the rules, regulations, or decisions of federal agencies" and that the "enormous record" of "advertising guides, agreements, proposed trade regulation rules, consent orders, investigations, determinations, and rulemakings * * * related specifically to the use of 'low tar' and 'lights'" in cigarette advertising and labeling. Because the record clearly demonstrates that PMUSA has used these terms only on products "below the fifteen mil-

ligram cutoff," PMUSA asserted that such compliance provided a "full defense" to plaintiffs' Consumer Fraud Act claim. Relying on this court's decisions in *Lanier v. Associates Finance, Inc.*, 114 Ill.2d 1, 18, 101 Ill.Dec. 852, 499 N.E.2d 440 (1986) (finding compliance with disclosure requirements of federal Truth in Lending Act as interpreted by Federal Reserve Board staff to be a defense to liability under the Consumer Fraud Act), *Jackson v. South Holland Dodge, Inc.*, 197 Ill.2d 39, 47, 258 Ill.Dec. 79, 755 N.E.2d 462 (2001) (finding compliance with federal statute to be a defense to liability under the Consumer Fraud Act), and *Jarvis v. South Oak Dodge, Inc.*, 201 Ill.2d 81, 88, 265 Ill.Dec. 877, 773 N.E.2d 641 (2002) (recognizing state policy against extending consumer disclosure requirements beyond those mandated by federal law), PMUSA attempted to rebut plaintiffs' argument that the lack of trade regulation rules governing the use of these descriptors meant that their use could not have been "specifically authorized" by the FTC.

Plaintiffs' argument on this point was that the FTC had not specifically authorized PMUSA to use the terms "lights" or "lowered tar and nicotine" and, "in fact, lacks the authority to do so."

The circuit court took the matter under advisement. Between that date and November 8, 2002, the date upon which the circuit court issued its order, plaintiffs filed their first amended complaint. In the first amended complaint, plaintiffs abandoned some of the claims that defendants had argued were preempted. The remaining complaint, according to plaintiffs, was that defendant's use of the terms "lights" and "lowered tar and nicotine" was an affirmative misrepresentation and, thus, according to *Cipollone*, not preempted by the Act.

The circuit court's order noted PMUSA's argument that this claim of affirmative misrepresentation necessarily depends on plaintiffs' proving neutralization of the warning and a fraud on the FTC and acknowledged that "to the extent that their claims do depend on such a showing,"

such claims would be preempted under *Cipollone* and *Buckman*. However, the circuit court reserved judgment on the preemption question, finding it premature to address these defenses because there were "significant disputes about several material facts" that could not be resolved without live testimony. "A trial," according to the circuit court, would be required before the court could decide, "on a full and complete record whether the plaintiffs have stayed within the bounds of *Cipollone* and whether they are attempting to cross the line laid down in *Buckman*."

The November 8, 2002, order did not address PMUSA's affirmative defense based on the exemption provision contained in section 10b(1) of the Consumer Fraud Act. The order did not, however, reject this defense. Thus, when the circuit court "specifically reserve[d] judgment until trial on the issues presented in defendants' motion for summary judgment," judgment on this defense was reserved, presumably in order for the circuit court to determine, at trial, whether the FTC had specifically authorized the use of the disputed terms.

4. *Trial*

At trial, plaintiffs' case in chief consisted of the testimony of the 2 class representatives, 4 other class members, and 12 expert witnesses. PMUSA presented the testimony of 18 class members (one of the class representatives, 3 of the originally named plaintiffs who had withdrawn, and 14 others) and 7 experts. On rebuttal, plaintiffs recalled 2 of their experts and offered 2 additional experts.

Little of the testimony presented by plaintiffs in their case in chief was directed at PMUSA's affirmative defenses for the obvious reason that the burden of proving these defenses rested with the defendant. For purposes of resolving the issue that this court finds dispositive, only the testimony of two expert witnesses is relevant.

Plaintiffs' expert witness Dr. Neil Benowitz holds an M.D. from the University of Rochester and is board certi-

fied in internal medicine, clinical pharmacology, and medical toxicology. He is a full professor on the faculty of the University of California at San Francisco, where he is chief of the clinical pharmacology division in the department of medicine. In addition to teaching and seeing patients, Dr. Benowitz does research involving the actions of various drugs, including nicotine, and has written numerous articles on the subject of smoking and health.

Dr. Benowitz testified at length about nicotine addiction, the health effects of smoking, compensatory behavior, and the limitations of the FTC testing method. On cross-examination, Dr. Benowitz testified that he had recently received a letter from the FTC eliciting his opinion on a number of issues, including the FTC testing method and the use of the term "lights" and other descriptors. A copy of the letter was admitted into evidence. In addition to replying to the FTC inquiry, Dr. Benowitz and other scientists who had received similar inquiries wrote a joint letter to the FTC in which they expressed their concern that their responses to the FTC inquiries might be used to suggest that they supported the FTC's testing method. The joint letter also expressed the scientists' opinion that the terms "low tar," "light," and "ultra-light" are deceptive. The joint letter was also admitted into evidence. Dr. Benowitz stated that the FTC had not yet concluded the inquiry and that the use of the descriptors was still under consideration.

At this point in the cross-examination, the circuit court sustained plaintiffs' objection to further questioning on the subject of descriptors on the basis of relevance. PMUSA argued that the FTC's ongoing consideration of the use of descriptors was "directly relevant to pre-emption." The court ruled that there was "no question in this court on pre-emption." Although counsel for PMUSA reminded the circuit court that it had reserved ruling on its affirmative defenses pending the resolution of factual issues, the court would not permit further questioning of this witness with regard to his knowledge of or participa-

tion in the recent FTC inquiry into the use of low tar descriptors.

The circuit court thereafter sustained a series of objections to questions regarding the FTC testing method and the use of descriptors, but allowed PMUSA to make a written offer of proof. Nothing in the redirect or re-cross-examination of this witness related to the question of whether the FTC authorized use of the disputed descriptors. At the conclusion of re-cross-examination, counsel for PMUSA clarified that the written offer of proof would be filed, addressing three of its affirmative defenses. The circuit court reiterated its ruling that any currently pending FTC consideration of the use of descriptors was not relevant to this case.

Plaintiffs have not called our attention to any other portion of the trial transcript in which they elicited testimony, either on direct examination or cross-examination, on the question of whether the FTC may or may not have specifically authorized the use of descriptors such as "light" or "low tar" in cigarette labeling or advertising.

Dr. John Peterman testified as an expert witness on behalf of PMUSA. Dr. Peterman holds a Ph.D. in economics and has taught at the University of Chicago and the University of Virginia. He was employed at the FTC from 1976 to 1993. From 1988 until he left the FTC, he was the director of its Bureau of Economics. His area of expertise is regulatory economics. He testified that he had made an extensive study of regulation of the tobacco industry, including the history of FTC regulation of cigarettes, especially those described as "light" or "low tar."

According to Dr. Peterman, the FTC tar and nicotine program, which began in 1966, has two goals. First, it aims to provide consumers with information about tar and nicotine yields with the aim of facilitating their movement from higher yield products to lower yield products. Second, the FTC seeks to promote an overall reduction in tar and nicotine yields by encouraging tobacco companies to compete to bring lower yield products to market. The

FTC adopted several mechanisms in support of these goals. First, it adopted a "single uniform protocol" to derive the tar and nicotine numbers that could be conveyed to consumers. Second, it published the numbers derived from the testing program. Initially, the numbers were reported to Congress. Later, the FTC permitted (and eventually required) that the numbers be included in cigarette packaging and advertising. Thus, in keeping with both goals, the FTC encourages competitive advertising of tar and nicotine yields. Dr. Peterman further testified that a third part of the FTC program is the permitting of the use of certain designators such as "light" and "low tar" if the product meets certain conditions specified by the FTC.

In response to questions regarding the FTC's regulatory activity, Dr. Peterman testified that the FTC can undertake the promulgation of formal rules. In lieu of formal rulemaking, the FTC can withdraw proposed rules if those affected voluntarily agree to comply. In addition, the FTC can issue advisory opinions upon request by an industry actor or other interested party. Finally, the FTC can undertake investigative and enforcement efforts pursuant to section 5 of the FTC Act. 15 U.S.C. § 45(a) (2000). After filing a formal complaint charging a violation of the Act, the FTC can resolve the complaint and achieve its regulatory objective by means of a consent order. Such orders are a matter of public record and are published in the Federal Register. According to Dr. Peterman, the FTC uses such orders to "provide guidance to other firms in the industry." He stated, "While I was at the Commission, we considered all the activities that resulted in changes in firm behavior in response to Commission action as the FTC regulation of that activity." Thus, the FTC selected cases for enforcement "with the aim" of providing "significant guidance" to industry members.

A substantial part of Dr. Peterman's testimony involved the history of the regulation of cigarette advertising that

this court has already summarized, above, based on the documentary record. In addition, he testified regarding the FTC's own use of and definitions of the terms "low tar" and "ultra low tar." Specific reference was made to the FTC's annual Report to Congress, which Dr. Peterman described as a report summarizing "what's going [on with regard] to cigarette advertising, the regulatory activities the commission is engaged in, and to make recommendations to Congress for changes in the law." The Annual Report is an official statement of the FTC, which the FTC is required by the Labeling Act to prepare.

Copies of the annual FTC Reports to Congress from 1967 to 2000 were identified by Dr. Peterman and admitted into evidence without objection. Dr. Peterman testified that he reviewed the reports in preparation for his testimony and that they reflected the official position taken by the FTC at the time they were transmitted to Congress. Specifically, he called attention to the portions of the 1968, 1970, 1971, 1979, and 1980 reports in which the FTC used or defined the term "low tar." He opined that the FTC has adopted an "official definition" of the term as a cigarette containing 15 milligrams or less tar.

Through the testimony of Dr. Peterman, PMUSA also called the circuit court's attention to several reports prepared by FTC staff that were placed on the public record and transmitted to Congress. According to Dr. Peterman, such reports represent the position of the FTC. In one report, the FTC staff noted that FTC annual reports to Congress "began in early 1967 and signaled the beginning of a new submarket trend based upon the FTC's official definition of low-tar cigarettes (15 or less milligrams of tar)." See FTC Staff Report, Bureau of Economics, Brand Performance in the Cigarette Industry and the Advantage to Early Entry, at 35 (June 1979). In 1981, the FTC reported to Congress on the conclusion of a study undertaken in 1976, in response to FTC's taking notice of extensive promotion and development of low tar and nicotine cigarettes. According to Dr. Peterman, the staff

report "reconfirmed" that FTC "formally defines" low tar as 15 milligrams or less. See FTC Staff Report, Cigarette Advertising Investigation, at 1-50 n.175 (May 1981).

Over plaintiffs' objection, PMUSA was allowed to admit into evidence a copy of a November 24, 1998, letter from Senator Frank R. Lautenberg of New Jersey to then-FTC Chairman Robert Pitofsky. The Senator urged Chairman Pitofsky "to begin a proceeding to suspend the right of tobacco companies to market any cigarettes as 'Light' or 'Ultra Light' or list supposed nicotine and 'tar' ratings on their products and advertisements until and unless an accurate system of measuring the health implications of smoking is established." Lautenberg accompanied the letter with copies of "tobacco industry documents" that provided, in Lautenberg's words, "strong evidence that the tobacco industry knows that the nicotine and tar ratings used to determine what constitutes 'Light' cigarettes are false and misleading to consumers." Peterman described the Senator's request as specifically targeting the use of the word "light" as a descriptor by PMUSA and other tobacco companies.

The FTC responded to the letter in a news release, a copy of which was also admitted into evidence. The FTC acknowledged receipt of documents of which it was not previously aware and that the "existing testing methodology both significantly understates actual tar and nicotine intakes and doesn't properly account for differences in tar and nicotine intakes." The FTC also announced that its staff had been working with the Department of Health and Human Services on an informal basis to address these issues and that it had "now formally requested, and HHS has agreed," to conduct a review of the FTC testing methodology and of the "limited health benefits, previously believed to be associated with lower tar and nicotine cigarettes." FTC Statement in Response to Senator Frank Lautenberg's Release of Tobacco Documents, November 24, 1998.

Dr. Peterman then testified that the FTC does regulate the use of the descriptor "lights" and that it permits "the use of the descriptor 'lights' in cigarette advertising under certain conditions." He based this conclusion on his expert understanding of the FTC's functions and operations and on the 1971 consent order, the 1995 consent order, and the results of the various FTC investigations and deliberations on the subject of the use of measurements and descriptors of tar in cigarette advertising. He further testified that, based on his investigation and experience, that PMUSA's advertising of Marlboro Lights and Cambridge Lights is in compliance with the FTC requirements. Both cigarettes yield less than 15 milligrams of tar based on the FTC test method and both brands are lower in tar than their full-flavor counterparts, Marlboro Reds and regular Cambridge cigarettes.

Regarding the 1971 American Brands consent order, Dr. Peterman testified that the order was an "official act" of the FTC and that it was published for the purpose of providing guidance to industry members regarding the use of descriptors. He stated that the consent order said to industry members, in effect: "If in the future you use the term 'low,' 'lower,' or any light [*sic*] qualifying terms to describe your product, it [will be] necessary to put the tar and nicotine yield in the ad."

Regarding the FTC investigation into the "channel" filter used by the manufacturer of Barclay cigarettes, Dr. Peterman explained that because the construction of the filter caused the mandatory FTC method to produce unreliable results, there were no accurate yield numbers that the manufacturer could include on the package or in its advertising. Thus, he opined, the FTC "indicated to Barclay that if it wished, it could advertise the product simply as low tar," because the FTC estimated that, if not for the channel filter construction, the yield under the FTC method would have measured in the 3 to 7 milligrams range, well within the 15 milligrams or less definition of a low tar cigarette.

Similarly, when it investigated Carlton cigarettes in 1994, the FTC acted to ban use of "fractions, multiples, or ratios that implied actual intake differences" between Carlton and other brands. Nevertheless, Dr. Peterman stated, the FTC allowed American Brands, the manufacturer of Carltons, to make the claim that Carlton cigarettes were "low" or "the lowest" in tar. He was allowed to testify, over plaintiffs' objection, that the publication of the consent order in this matter was intended by the FTC to give guidance to the rest of the industry.

Dr. Peterman further testified that on September 12, 1997, the FTC caused the publication in the federal register of a request for comments regarding cigarette descriptors. Specifically, "it asked for comments as to whether the descriptors 'low tar' and 'light,' which covered products between [*sic*] 15 milligrams and less, should be changed or in any way are potentially misleading. And they asked for similar comments with respect to 'ultra light' products, which were cigarettes ranked using the FTC test method from 6 and under milligrams of tar." According to Dr. Peterman, that investigation remained open as of the date of his testimony.

PMUSA's expert summarized the FTC's rules regarding the use of "low," "lower," "light," and similar descriptors as follows: use of the terms "low tar" and "lowered tar" is permitted if the cigarette yields 15 milligrams or less of tar under the FTC test method; it is not permissible for a manufacturer to make representations of specific numeric reductions in tar intake by smokers; the term "lights" is deemed by the FTC to be synonymous with the term "low tar"; and, finally, the FTC "intended the industry generally to conform its advertising to these rules." Dr. Peterman specifically relied upon the various consent orders to formulate this opinion.

Questioned further about the terms "light" or "lights" as applied to cigarettes, Dr. Peterman testified that the FTC equates the term "light" with "low tar." He based his opinion on an internal study conducted during his tenure

at the FTC which revealed that the two terms were used synonymously to refer to cigarettes with a tar yield of 15 milligrams or less. The FTC considers the term "lights" to be a description of a "low tar" cigarette.

He testified further regarding the FTC investigation that began in 1976 and concluded in 1981 with an FTC staff report to Congress. The staff report stated that the FTC had determined that such descriptors were not false or misleading. As a result, the report did not recommend banning the use of such descriptors. Instead, the report recommended strengthening the required warnings on cigarette packages and rotating several different warnings to keep the message fresh in the minds of consumers. According to Dr. Peterman, the FTC responded to the staff report by recommending changes in the warning program, but continued to permit use of the descriptors.

The cross-examination of Dr. Peterman focused almost entirely on questions related to the issue of federal preemption. He was not asked in any detail about the FTC's authorization of the use of the terms "low tar," "lower tar," "lights," or other descriptors. Rather, he was questioned in great detail about whether state regulation of the use of such terms would conflict with the FTC's program.

During a recess in the cross-examination of Dr. Peterman, the circuit court indicated to counsel for PMUSA that "if you're relying on [*sic*] just on him, you lose preemption, and I – I'll just go ahead and not waste your time and strike your defense." Counsel for PMUSA explained that Dr. Peterman's testimony also went "directly to the primary jurisdiction defense," and that the testimony regarding "the use of descriptors is very direct evidence of our primary jurisdictional affirmative defense."

After cross-examination resumed, Dr. Peterman admitted that he could not identify any FTC trade regulation rule that regulated the use of low tar descriptors. He also agreed with plaintiffs' assertion that no FTC trade regulation rule either requires the use of such descriptors or ap-

proves the use of such descriptors. He was then asked if the use of such descriptors by a tobacco company was "a voluntary one." He replied that it would be a decision to be made by the individual firm. A cigarette manufacturer could drop the use of the term "light" or other low tar descriptors if it chose to do so, but would still, under FTC policy, have to publish the tar and nicotine numbers.

With regard to the 1971 consent order entered into by the FTC and American Brands, Dr. Peterman was asked whether he believed that the consent order provided guidance to the cigarette industry and if, even though PMUSA was not a party to the order, it would "sort of know how far they can go and how far they can't go." He agreed with this statement.

The evidence offered by plaintiffs on the issue of damages is worthy of mention. Plaintiffs' expert Jeffrey Harris, M.D., testified regarding the "contingent valuation analysis" that he conducted using data obtained by J. Michael Dennis, Ph.D. Dr. Harris holds a bachelor's degree from Harvard University and masters and doctoral degrees from the University of Pennsylvania. He is currently on the faculty of the economics department of the Massachusetts Institute of Technology and holds an appointment with the Harvard Medical School. Dr. Dennis is the vice president and managing director of the Government and Academic Research Department of Knowledge Networks in California.

Dr. Dennis testified that Knowledge Networks conducts surveys on the Internet, primarily for university professors or other academics who are conducting federally sponsored research. The company has "web-enabled" a panel of some 40,000 randomly selected United States households to participate in various surveys. The demographic characteristics of these households is generally similar to the United States population as a whole.

For purposes of this case, 2,701 panel members were invited to participate in a survey on the basis of their being current or recent smokers. 1,779 of these responded

to the on-line invitation by completing the "screening survey"; 276 of these "qualified for the main interview" based on their answers to three screening questions. The screening questions eliminated those who had not smoked in the previous year, those who did not smoke Marlboro or Cambridge products, and, finally, those who did not smoke Lights. In addition, the panel members were eliminated if they answered "no" to the question whether they could recall the reason they initially chose to smoke a light or lower tar and nicotine cigarette. About 23% of those remaining could not. In addition to answering a series of questions about their beliefs regarding the relative safety of lower tar cigarettes compared to full-flavor cigarettes, the remaining respondents were asked to assume that Marlboro Lights were more hazardous than full-flavor cigarettes and to imagine the existence of a Marlboro Light that was identical in all other respects to the current product, except that it was truly safer to smoke. The respondents were then asked to state how much of a discount would be required to cause them to purchase the more hazardous product if the safer version were actually available.

Based on the answers to this question, Dr. Harris calculated that class members, on average, would demand a 92.3% discount from the market price if they were to continue to purchase Marlboro Lights. Applying this discount to all purchases of Marlboro and Cambridge Lights during the relevant class periods, and calculating prejudgment interest at 5%, noncompounded, Harris concluded that the 1.14 million members of the class had suffered $7.1005 billion in economic damages.

On cross-examination, Dr. Harris agreed that he had provided input into language used in the survey questions used by Knowledge Networks. He agreed that he was not an expert in survey design and did not consult such an expert before formulating the questions. He was unaware of any texts or guides for the formulation of contingent valuation surveys, although he was aware that such sur-

veys are controversial. When asked if his diminution-in-value analysis "assumes both the reliability and the validity of the Knowledge Networks survey," he answered "yes," but offered no basis for his assumption.

PMUSA's expert, W. Kip Viscusi, Ph.D., is a professor of economics who holds four degrees from Harvard University. He has taught at Northwestern University and the University of Chicago and is presently on the faculty at Harvard University, where he holds an endowed chair and heads the program on Empirical Legal Studies. Dr. Viscusi described his particular expertise in the area of survey design and analysis. He has been analyzing survey data since 1976 and designing surveys since 1981 and has been published in numerous peer-reviewed books and journals. His specialty is the subject of risk and uncertainty.

Dr. Viscusi testified that the price of Marlboro Lights and Cambridge Lights has always been identical to the price of their full-flavored counterparts and, therefore, because the plaintiffs did not pay a premium for the claimed "lightness" of these products, they could not have suffered any economic loss. With regard to Dr. Harris' reliance on the Knowledge Networks survey offered by plaintiffs as evidence of economic damages, Dr. Viscusi explained that a contingent valuation survey attempts to determine the value in the marketplace of a hypothetical product. He offered three guidelines that he described as "good, sound practice" for such surveys. First, the survey should be pretested to ensure that the people taking the survey understand the questions. Second, the hypothetical "good" that is being described must be made fully understandable to the survey respondents, so that they will be able to "value the good." Third, because the "good" is a hypothetical product, "not a real market transaction," it is necessary for the survey to contain "internal consistency checks." When real market data is not available to compare to the survey answers and the survey itself does not ensure consistency, it may not be possible to determine

whether the survey respondents took the questions seriously. They may perceive the hypothetical transaction as involving only "funny money." Dr. Viscusi testified that the Knowledge Networks survey violated all three of these guidelines.

At the close of evidence, PMUSA again sought decertification of the class and moved for judgment as a matter of law. After considering proposed findings of fact and conclusions of law submitted by both parties, the circuit court declined to decertify the class, rejected each of PMUSA's 27 affirmative defenses, and entered judgment for the plaintiffs on the issue of liability.

5. *Judgment Order*

The circuit court issued its judgment order on March 21, 2003. The portion of the order relating to the issue of class certification was noted above.

In the judgment order, the circuit court ruled on issues upon which it had earlier reserved judgment. Ruling that the Labeling Act does not expressly preempt plaintiffs' claims under the Consumer Fraud Act, the circuit court stated that plaintiffs' Consumer Fraud Act claims are based upon "'a state-law duty not to make false statements of material fact or to conceal such facts'" (quoting *Cipollone*, 505 U.S. at 528, 112 S.Ct. at 2623, 120 L.Ed.2d at 430). Further, the circuit court ruled that even if plaintiffs' Consumer Fraud Act claim is expressed in terms of an omission rather than misrepresentation, the omission of information qualifying the claim of lower tar cannot be read as a claim of failure to warn. See *Cipollone*, 505 U.S. at 528, 112 S.Ct. at 2623, 120 L.Ed.2d at 430. A claim of concealment of a material fact – that the claim of lowered tar was based on a laboratory measurement that was known to be an inaccurate representation of the actual delivery of tar – is a claim of fraud, not a claim of failure to warn.

Further, the circuit court noted that neither the Labeling Act nor the regulations of the FTC govern a cigarette manufacturer's voluntary use of the terms "lights" and

"lowered tar and nicotine" as descriptors on packaging. The mere fact that the FTC has, at times, considered and rejected such regulations does not create conflict preemption. The circuit court also rejected defendant's reliance on the first amendment and on article I, sections 4 and 5, of the Illinois Constitution as bases for finding plaintiffs' claim preempted. The circuit court stated that neither the federal nor the state constitution protects commercial speech that is false and misleading.

Then, without specifically referring to section 2 or section 10b(1) of the Consumer Fraud Act, the circuit court stated:

> "Philip Morris' Seventh Affirmative Defense – Compliance with Government Regulations – is denied. The false and misleading use of the descriptors 'Lights' and 'Lowered Tar and Nicotine' has never been specifically authorized by law. Philip Morris voluntarily chose to use these terms on its packages of Marlboro Lights and Cambridge Lights. No regulatory body has ever required (or even specifically approved) the use of these terms by Philip Morris. The court finds that Philip Morris has not established that its conduct is 'specifically authorized' by law."

The circuit court characterized plaintiffs' Consumer Fraud Act claim as being based on two distinct types of fraudulent statements by PMUSA. First, plaintiffs alleged that the representations "light" and "lower in tar and nicotine" on Marlboro Lights and Cambridge Lights labels were "material and false." Second, with regard to plaintiffs' claim that the smoke delivered by Marlboro Lights and Cambridge Lights is more mutagenic than the smoke delivered by their full-flavored counterparts, the circuit court characterized the claim as one of misrepresentation by omission. That is, the descriptors "light" and "lowered tar and nicotine" were "fraudulent and misleading because [they] did not state matters which materially qualify the statement as made." The "matters not stated,"

according to the circuit court, were that the tar from Marlboro Lights and Cambridge Lights "is higher in toxic substances and more mutagenic" than tar from regular cigarettes. The circuit court expressly noted its reliance on the testimony of plaintiffs' experts, whom it found more credible than PMUSA's experts. In its findings of fact, the circuit court stated that although PMUSA's "misrepresentations in this case were not in the form of an explicit statement" of increased health or safety, class members "universally understood the message of reduced risk from these products." The court also found that PMUSA was aware, as a result of its own research, of increased mutagenicity of the smoke from its light cigarettes. In addition, the court found that even if a smoker of light cigarettes does not compensate completely, he or she will receive higher levels of most of the toxic substances contained in cigarette smoke than a smoker of regular cigarettes.

As for the elements of the Consumer Fraud Act claim, the circuit court found:

> "After considering all the testimony and evidence admitted at trial, the Court finds that the Plaintiffs have proven that Philip Morris has violated the Consumer Fraud Act through the deceptive act of misrepresenting its Cambridge Lights and Marlboro Lights products as 'Lights' and misrepresenting Marlboro Lights as 'Lowered Tar and Nicotine.' The Court further finds that Philip Morris intended that the Class members in this case rely upon the deception created by these misrepresentations. These misrepresentations occurred in the course of conduct involving trade or commerce and caused actual damage to the Plaintiffs in the amount of $7.1005 Billion. This actual damage to the Plaintiffs' was proximately caused by the misrepresentations of Philip Morris."

The circuit court awarded $3 billion in punitive damages, to be paid to the State of Illinois and attorney fees in the amount of 25% of the compensatory award.

In response to a posttrial motion raising the issue of whether the multistate tobacco settlement agreement barred the state from receiving any of the punitive damages amount, the court modified its judgment so that the punitive damages award would revert to the members of the plaintiff class if the state were found to be barred from receiving such funds. See *People v. Philip Morris, Inc.*, 198 Ill.2d 87, 92-93, 259 Ill.Dec. 845, 759 N.E.2d 906 (2001) (explaining the circumstances under which the State of Illinois joined the multistate "Master Settlement Agreement" of claims against several tobacco industry defendants).

II. ISSUES ON APPEAL

On appeal, PMUSA argues that (1) the circuit court erred by rejecting certain of its affirmative defenses, (2) the circuit court erred by certifying a plaintiff class, (3) plaintiffs failed to establish their claims and the claims of the class members, (4) the damages award is erroneous, and (5) the circuit court erred in finding that certain documents were not privileged. Under each of these issues, PMUSA raises numerous subissues.

III. PMUSA'S AFFIRMATIVE DEFENSES

Since the mid-1950s, the FTC has regulated the labeling and advertising of cigarettes, including the disclosure by manufacturers of tar and nicotine levels in their products. PMUSA unsuccessfully argued to the circuit court that the existence of a comprehensive federal regulatory scheme governing these topics bars plaintiffs' claim as a matter of law on four separate bases. PMUSA renews these arguments before this court. First, PMUSA asserts that sections 2 and 10b of the Consumer Fraud Act (815 ILCS 505/2, 10b (West 2000)) bar plaintiffs' claim. Second, PMUSA argues that even if state law permits such a claim, plaintiffs' Consumer Fraud Act action is expressly preempted by the Federal Cigarette Labeling and Adver-

tising Act (Labeling Act) (15 U.S.C. § 1331 *et seq.* (2000)). Third, PMUSA contends that this claim is barred by the doctrine of conflict preemption. Fourth, PMUSA argues that labeling of its light cigarettes comes within the protection of the first amendment and article I, section 4, of the Illinois Constitution. In addition, PMUSA cites the three-year statute of limitations applicable to actions brought under the Consumer Fraud Act (815 ILCS 505/10a(e) (West 1998)), which, it argues, precludes class certification and limits the damages period. Because we find section 10b(1) of the Consumer Fraud Act bars plaintiffs' claim, we need not address the other issues raised in this appeal.

The Consumer Fraud Act was enacted in 1961 as a regulatory and remedial statute for the purpose of protecting consumers and others against fraud, unfair methods of competition, and unfair or deceptive acts or practices in the conduct of any form of trade or commerce. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill.2d 403, 416-17, 266 Ill.Dec. 879, 775 N.E.2d 951 (2002). It is to be liberally construed to effectuate this purpose. *Cripe v. Leiter*, 184 Ill.2d 185, 191, 234 Ill.Dec. 488, 703 N.E.2d 100 (1998). Section 10b(1) of the Consumer Fraud Act provides that nothing in the Act shall apply to "[a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." 815 ILCS 505/10b(1) (West 1998).

Illinois enacted the Deceptive Practices Act in 1965 primarily for the purpose of defining and prohibiting deceptive trade practices (see 1965 Ill. Laws 2647, eff. January 1, 1966 (title of Act)) and unfair competition (see *Chabraja v. Avis Rent A Car System, Inc.*, 192 Ill.App.3d 1074, 1079, 140 Ill.Dec. 221, 549 N.E.2d 872 (1989)) (noting that the prefatory notes to the statute specifically refer to deceptive conduct that unreasonably interferes with another in the promotion and conduct of his business). Section 4(1) of the Deceptive Practices Act provides: "This

Act does not apply to: (1) conduct in compliance with the orders or rules of or a statute administered by a Federal, state or local governmental agency." 815 ILCS 510/4 (West 1998).

Before this court can determine whether section 10b(1) of the Consumer Fraud Act bars plaintiffs' claim, we must be clear about the precise nature of the conduct alleged by the plaintiffs to have constituted fraud. Having carefully reviewed the pleadings, we reject PMUSA's attempt to cast plaintiffs' claim as one of failure to make additional disclosures beyond the warning required by federal law. Plaintiffs' claim is not based on failure to warn or on neutralization of the required warnings. It is not a claim of fraud on the FTC, nor is it a claim for damage to plaintiffs' health.

Plaintiffs have pleaded a pure case of consumer fraud. They allege that PMUSA used the descriptive terms "light" and "lowered tar and nicotine" on its packaging and in its advertising with the knowledge that these terms are deceptive, and with the intent that consumers rely upon the false message in making purchasing decisions. Plaintiffs have further alleged that the class members relied, to their detriment, on these false claims. See *Oliveira*, 201 Ill.2d at 149, 267 Ill.Dec. 14, 776 N.E.2d 151 (listing elements of a cause of action under the Consumer Fraud Act). In addition, plaintiffs assert that the smoke that was delivered by the PMUSA products was even more toxic and more mutagenic than smoke from full-flavor cigarettes.

If the use of these descriptive terms in the manner alleged has been specifically authorized by the FTC in the course of carrying out the duties assigned to it by Congress, this action cannot stand, even if the terms might be found deceptive by a trier of fact. 815 ILCS 505/10b(1) (West 1998). Similarly, if these terms have been used by PMUSA in compliance with the orders or rules of the FTC, an action under the Deceptive Practices Act is also barred. 815 ILCS 510/4 (West 1998).

A. Standard of Review

PMUSA suggests that its affirmative defenses raise questions of law and, therefore, the proper standard of review is *de novo*, citing *Woods v. Cole*, 181 Ill.2d 512, 516, 230 Ill.Dec. 204, 693 N.E.2d 333 (1998). Plaintiffs have not objected to *de novo* review. We conclude that *de novo* review is warranted, but not for the reason suggested by PMUSA.

As a threshold matter, we must construe the language of section 10b(1). Statutory construction is a question of law, subject to *de novo* review. *Advincula v. United Blood Services*, 176 Ill.2d 1, 12, 223 Ill.Dec. 1, 678 N.E.2d 1009 (1996). Once the statute is properly construed, its terms must be applied to the circumstances of the individual case to determine whether it bars this action. It is arguably a question of fact whether the FTC did, or did not, specifically authorize the use of certain descriptive terms in cigarette labeling and advertising. Indeed, the circuit court felt it necessary to reserve judgment on the affirmative defenses pending the creation of a factual record at trial. It could, therefore, be argued that the application of section 10b(1) to the facts should be reviewed under a more deferential standard. See, *e.g.*, *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill.2d 351, 369, 267 Ill.Dec. 29, 776 N.E.2d 166 (2002) (noting that when the "issue presented cannot be accurately characterized as either a pure question of fact or a pure question of law," it may be properly reviewed under an intermediate standard of review).

We, nevertheless, review *de novo* the application of section 10b(1) to the facts of this case. Although the circuit court made a finding that the FTC did not specifically authorize the use of the disputed terms, this is not a finding of fact that proceeded from the circuit court's assessment of credibility of witnesses or the weight it chose to give to conflicting pieces of evidence. Rather, the actions of the FTC with relation to the use of these terms in cigarette advertising and labeling are a matter of public record.

Thus, the statute is being applied to facts that are essentially undisputed. Because we need not evaluate the credibility of witnesses or weigh conflicting testimony to determine whether the actions of the FTC have resulted in specific authorization of the use of these terms by cigarette manufacturers, we may properly draw our own conclusion on the issue. *Steinbrecher v. Steinbrecher*, 197 Ill.2d 514, 523, 259 Ill.Dec. 729, 759 N.E.2d 509 (2001) (where the question on appeal is limited to application of the law to undisputed facts, the standard of review is *de novo*).

B. PMUSA's Argument

PMUSA argues that section 10b(1) bars this action based on the FTC's regulatory scheme and Congress' regulation of cigarette advertising through the Labeling Act. Citing this court's decisions in *Lanier*, 114 Ill.2d at 17, 101 Ill.Dec. 852, 499 N.E.2d 440, and *Jackson*, 197 Ill.2d at 49, 258 Ill.Dec. 79, 755 N.E.2d 462, which are discussed in detail below, PMUSA argues that its compliance with federal law, combined with the policy against extending disclosure requirements beyond what is mandated by law, satisfy the requirements of section 10b(1). At oral argument, counsel for PMUSA characterized section 10b(1) as a "safe harbor for those whose conduct does not violate federal law."

In the alternative, PMUSA argues that even if compliance with applicable law is not sufficient to bar Consumer Fraud Act liability (see *Jackson*, 197 Ill.2d at 58-60, 258 Ill.Dec. 79, 755 N.E.2d 462 (Kilbride, J., specially concurring, joined by Harrison, C.J.) (rejecting view that mere compliance with the applicable regulatory scheme, by itself, is sufficient to trigger the operation of section 10b(1))), the FTC has specifically authorized the use of the disputed descriptors in cigarette labeling and advertising. PMUSA asserts that regulatory agencies, including the FTC, "use a wide array of tools other than formal regulations to control industry conduct."

Throughout the history of FTC regulation of cigarette marketing, PMUSA claims, the agency has used advisory opinions, voluntary cooperation obtained in response to threatened regulation, investigations of individual industry actors, reports to Congress, and other methods of influencing the behavior of industry actors. Specifically, PMUSA argues, the FTC "has found that one especially effective method of regulation is to bring an enforcement action against one company to announce to an entire industry what behavior is and is not authorized." By resolving such actions with a consent decree, as the FTC did in the 1971 and 1995 cases, the FTC communicated to all industry actors the circumstances under which they may use "low tar" descriptors. For this assertion, PMUSA relies, in part, upon *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 294, 94 S.Ct. 1757, 1771, 40 L.Ed.2d 134, 153-54, (1974) ("'[A]djudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein'"), quoting *National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709, 714-15 (1969). Further, PMUSA insists, the FTC itself considers such conduct to be regulatory activity, as evinced by the testimony of Dr. Peterman and the many FTC documents admitted into evidence at trial.

In addition, PMUSA notes that the circuit court found in paragraph 148 of its judgment order that its practices "offend public policy, are immoral, unethical, oppressive and unscrupulous and that this course of conduct caused a substantial injury to the Class members," in violation of both the Consumer Fraud Act and the Deceptive Practices Act. Because an action under the Deceptive Practices Act is barred if the defendant's conduct is "in compliance with" FTC rules, PMUSA argues that it cannot be held liable under the Deceptive Practices Act in the absence of proof a violation of a governing rule or statute.

C. Plaintiffs' Response

Plaintiffs argue that the FTC has never "specifically authorized the fraudulent use of any descriptor, and it would lack the legal authority to do so in any event." They further argue that, whatever is meant by the term "specifically authorized," it clearly requires something more than mere compliance with federal law.

Plaintiffs point to Dr. Peterman's testimony on cross-examination in which he acknowledged that the FTC generally does not adopt trade regulation rules that approve conduct that a regulated entity may or may not choose to engage in. Rather, the FTC adopts regulations that require certain conduct or forbid other conduct. They note that no FTC document or official statement has ever announced that a tobacco company has "substantiated" its use of such descriptors. Further, they point to the FTC's "disavowal" of any "official" definition of these terms. See Cigarette Testing, Request for Public Comment, 62 Fed. Reg. 48,158, 48,163 (September 12, 1997) (noting that the FTC itself does not define terms such as "low tar," "light," "medium," "extra light," "ultra light," "ultra low," or "ultima," although "they appear to be used by the industry to reflect ranges of FTC tar ratings").

With regard to the 1971 and 1995 consent orders, plaintiffs dispute their relevance to the conduct of any industry actor other than the company that was a party to the enforcement action. The 1971 consent order, according to plaintiffs, did not mention "lights" and did not define "low tar." It imposed conditions upon the use of such terms with which, it argues, PMUSA has never complied. The 1995 consent order neither defined "lights" nor established a "numerical standard for 'low tar.'"

Plaintiffs distinguish *Lanier* on the basis that it involved an alleged fraudulent failure to disclose while this case involves PMUSA's "active and direct misrepresentations." In addition, plaintiffs offer *Jenkins v. Mercantile Mortgage Co.*, 231 F.Supp.2d 737, 752 (N.D.Ill.2002), in which the federal district court, applying Illinois law,

stated that *Lanier* did not hold that mere compliance with federal law does not bar liability under the Consumer Fraud Act.

D. Analysis

We begin our analysis with the observation that each party overstates its case with respect to this issue.

PMUSA asserts that mere compliance with applicable FTC regulations is enough to bar a Consumer Fraud Act action, correctly noting that application of section 10b(1) of the Consumer Fraud Act has never been held by this court to require that a federal agency or statute expressly authorize the conduct at issue. Rather, according to PMUSA, so long as the challenged conduct is in compliance with applicable federal law, section 10b(1) bars liability under the Consumer Fraud Act. Citing *Lorillard Tobacco*, 533 U.S. at 548, 121 S.Ct. at 2418, 150 L.Ed.2d at 555. PMUSA notes that by enacting the Labeling Act, Congress not only mandated the precise warnings that must appear on cigarette packaging and in cigarette advertising but also vested authority in the FTC to enact additional targeted regulations of cigarette advertising. See *Lorillard Tobacco*, 533 U.S. at 550, 121 S.Ct. at 2419, 150 L.Ed.2d at 556 (holding that the Labeling Act preempts state regulations specifically targeting cigarette advertising, but does not preempt state regulation of cigarette use or sales, or imposition of regulations of general applicability, such as zoning, which may have an effect on cigarette advertising). PMUSA argues that, pursuant to the authority vested in it by Congress to enact additional regulations regarding cigarette advertising, the FTC "has addressed precisely how cigarette manufacturers may communicate with consumers about tar and nicotine levels and has specifically considered and allowed the use of the descriptors at issue here." PMUSA asserts that its use of the terms "lights" and "lowered tar and nicotine" are in undisputed compliance with FTC regulations governing cigarette labeling and advertising and, as a result,

plaintiffs' claims under the Consumer Fraud Act are barred.

We reject PMUSA's assertion that section 10b(1) operates to bar plaintiffs' claim merely because PMUSA may have been in compliance with applicable federal law. The plain language of section 10b(1) requires that two separate conditions be present before a claim is barred. First, a regulatory body or officer must be operating under statutory authority. In this case, the first condition is met. The FTC operates under the authority of the FTC Act (15 U.S.C. § 45(a) (2000)), and the Labeling Act (15 U.S.C. § 1331 *et seq.* (2000)), to regulate the packaging and advertising of cigarettes. Second, liability under the Consumer Fraud Act is barred by section 10b(1) only if the action or transaction at issue is "specifically authorized by laws administered" by the regulatory body. 815 ILCS 505/10b(1) (West 1998). As we explain in detail, below, PMUSA's mere compliance with the rules applicable to labeling and advertising is not sufficient to trigger the exemption created by section 10b(1).

Similarly, while the FTC's own use of the terms "low tar" and "ultra low tar" and its apparent adoption of definitions of these terms (15 milligrams or less of tar and 6 milligrams or less of tar, respectively) clearly invites others to use the same or similar terms to describe certain cigarettes, it cannot be said that the FTC's own use of such terms in its reports to Congress or elsewhere "specifically authorizes" cigarette manufacturers to use these terms in labeling and advertising. Conduct is not specifically authorized merely because it has not been specifically prohibited. Conduct is not specifically authorized merely because it has been passively allowed to go on for a period of time without regulatory action being taken to stop it. Instead, we must look to the affirmative acts or expressions of authorization by the FTC to answer this question.

Plaintiffs' argument that the FTC "has never 'specifically authorized' the fraudulent use of *any* descriptor, and

it would lack the legal authority to do so in any event" (emphasis in original), is similarly overstated. Whether these terms are deceptive goes to the merits of the fraud claim, not to the threshold question of exemption under section 10b(1), under which the real issue is whether the FTC has specifically authorized PMUSA and other cigarette manufacturers to use these terms on their packaging and in their advertising, no matter how vague or unhelpful these terms might be to consumers.

Plaintiffs also claim that PMUSA's use of these terms cannot be deemed authorized by the 1971 consent order because PMUSA has not accompanied its use of these terms with "a clear and conspicuous disclosure of" the tar and nicotine content of the advertised cigarette *and* of the cigarettes to which it was being compared. This argument has no merit because the quoted language applies only when the manufacturer is making a direct comparison between its brand of cigarettes and a competing brand. See *American Brands*, 79 F.T.C. 255 (permitting advertising of cigarettes using "the words 'low,' 'lower,' or 'reduced' or like qualifying terms," if the statement is accompanied by a "clear and conspicuous disclosure" of the tar and nicotine content of the advertised cigarette; and, if a direct comparison is made to another brand or brands, disclosure of the tar and nicotine content of that brand or brands and of the "lowest domestic yield cigarette"). Indeed, the consent order expressly provides that "a comparison to a class of cigarettes, or to many or most of the cigarettes of a class, shall not be deemed a comparison to another brand or brands of cigarettes."

Having disposed of these arguments, we turn to the interpretation and application of section 10b(1) of the Consumer Fraud Act.

1. *The Statutory Language*

In determining whether section 10b(1) of the Consumer Fraud Act operates to bar the action at issue, we are guided by established principles. The primary rule of statutory construction is to ascertain and give effect to the

intent of the legislature. *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill.2d 141, 149, 227 Ill.Dec. 753, 688 N.E.2d 90 (1997), quoting *Illinois Power Co. v. Mahin*, 72 Ill.2d 189, 194, 21 Ill.Dec. 144, 381 N.E.2d 222 (1978). To do so, we examine the language of the statute, which is the most reliable indicator of the legislature's objectives in enacting the law. *Michigan Avenue National Bank v. County of Cook*, 191 Ill.2d 493, 504, 247 Ill.Dec. 473, 732 N.E.2d 528 (2000). When interpreting statutes, this court gives undefined words their plain and ordinary meaning. *Granite City Division of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill.2d 149, 181, 184 Ill.Dec. 402, 613 N.E.2d 719 (1993). It is entirely appropriate to employ the dictionary as a resource to ascertain the meaning of undefined terms. *People ex rel. Daley v. Datacom Systems Corp.*, 146 Ill.2d 1, 16, 165 Ill.Dec. 655, 585 N.E.2d 51 (1991).

The statutory language at issue provides that the Consumer Fraud Act shall not apply to actions "specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." 815 ILCS 505/10b(1) (West 1998). It is undisputed that the FTC acts under federal statutory authority to administer federal laws regarding the labeling and advertising of cigarettes.

To authorize is to "give legal authority; to empower," "[t]o formally approve; to sanction." Black's Law Dictionary 143 (8th ed.2004). Although the dictionary definition clearly encompasses formally promulgated trade regulation rules of the FTC, neither the definition nor the statute itself limit the application of the provision to authorization via formal agency rulemaking. Rather, so long as the conduct is specifically authorized "by laws administered by" the regulatory body, it is exempt from Consumer Fraud Act liability. Based on the dictionary definition, therefore, the specific authority contemplated by section 10b(1) may be either express or implied.

Authorization is "specific" if it is "[o]f, relating to, or designating a particular or defined thing; explicit," "[o]f or relating to a particular named thing." Black's Law Dictionary 1434 (8th ed.2004). The term "specifically" in section 10b(1) describes the substance or content of the authorization. It refers to the conduct that has been authorized, rather than the manner in which the authorization has been communicated. The term "specifically" indicates a legislative intent to require a certain degree of specificity or particularity in the authorization.

Neither party has offered any argument as to the meaning of the phrase "by laws administered by." However, we conclude that the legislature must have intended the phrase to require deference to agency policy and practice as it carries out the duties delegated to it by Congress or the General Assembly. If the legislature had intended to require that the specific authorization be contained in the law itself, it would have exempted conduct "specifically authorized by state or federal statute," not conduct "specifically authorized by laws administered by" a regulatory body.

Our focus, therefore, must be on the actions of the FTC with regard to cigarette labeling and advertising to determine whether, as a matter of state law, it specifically authorized PMUSA to use the disputed terms in its labeling and advertising. If the FTC has specifically authorized the use of the terms "lights" and "lowered tar and nicotine" by PMUSA in its labeling and advertising, PMUSA may not be held liable under the Consumer Fraud Act, even if the terms might be deemed false, deceptive, or misleading.

2. *Legislative Intent and Public Policy*

Our reading of the plain and ordinary meaning of the language of section 10b(1) is consistent with apparent legislative intent and with the public policy embodied in the Consumer Fraud Act. Although the Consumer Fraud Act is to be liberally construed to effectuate its purposes of protecting "consumers, borrowers, and business persons

against fraud, unfair methods of competition, and other unfair and deceptive business practices" (*Robinson*, 201 Ill.2d at 416-17, 266 Ill.Dec. 879, 775 N.E.2d 951), the legislature clearly intended for certain actions or transactions engaged in by entities otherwise subject to the Consumer Fraud Act to be exempt from liability under the Consumer Fraud Act and the Deceptive Practices Act, without regard to the possible merits of the asserted claim.

Section 10b(1) reflects a legislative policy of deference to the authority granted by Congress or the General Assembly to federal and state regulatory agencies and a recognition of the need for regulated actors to be able to rely on the directions received from such agencies without risk that such reliance may expose them to tort liability.

Further, section 10b(1), by exempting certain conduct from liability even if the conduct itself is objectionable, serves to channel objections to agency policy and practice into the political process rather than into the courts. See *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 432, 290 Ill.Dec. 525, 821 N.E.2d 1099 (2004) (suggesting that change in law affecting highly regulated industry be left to the legislature and the political process); *Charles v. Seigfried*, 165 Ill.2d 482, 493, 209 Ill.Dec. 226, 651 N.E.2d 154 (1995) (noting that public and social policy should emanate from the legislature). Parties who desire to bring about change in agency policies or rules can take their complaints to the agency itself and can participate in the formal rulemaking process. If their concerns are not addressed by the agency, they may seek assistance from their legislators and may use the political process, including the power of the ballot box, if their voices are not heard.

We conclude that neither the language of section 10b(1) nor the public policy of the State of Illinois, as expressed by the legislature, requires that a regulatory agency engage in formal rulemaking before it can specifically au-

thorize conduct by the entities over which it has regulatory authority.

3. *Illinois Case Law*

As noted above, both parties rely on this court's decision in *Lanier*, 114 Ill.2d 1, 101 Ill.Dec. 852, 499 N.E.2d 440, as the seminal case regarding application of section 10b(1) of the Consumer Fraud Act. PMUSA argues that, under *Lanier*, compliance with a federal regulatory scheme is sufficient to trigger the exemption of section 10b(1). Plaintiffs argue that this case is readily distinguishable from *Lanier*.

In *Lanier*, the consumer plaintiff alleged that the creditor defendants violated the Consumer Fraud Act and the Deceptive Practices Act by failing to explain the effect of the "Rule of 78s" if she prepaid her loan. *Lanier*, 114 Ill.2d at 5, 101 Ill.Dec. 852, 499 N.E.2d 440. Application of the rule to her loan caused her to have to pay more than $4,600 more than she would have been charged under the actuarial method of calculating interest. She argued that since the rule was understood by few borrowers, the defendants were obliged to explain the rule at the time of making a loan and that failure to do so constituted fraud. *Lanier*, 114 Ill.2d at 6, 101 Ill.Dec. 852, 499 N.E.2d 440. Defendants argued that their full compliance with the requirements of the federal Truth in Lending Act (TILA) (15 U.S.C. §§ 1601 through 1665 (1982)) was a defense to liability under the Illinois Consumer Fraud Act. *Lanier*, 114 Ill.2d at 11, 101 Ill.Dec. 852, 499 N.E.2d 440.

Relying on a Federal Reserve Board staff interpretation of the applicable regulation (*Lanier*, 114 Ill.2d at 12-13, 101 Ill.Dec. 852, 499 N.E.2d 440), this court determined that the defendant did not violate the TILA by failing to explain the operation of the Rule of 78s. *Lanier*, 114 Ill.2d at 14, 101 Ill.Dec. 852, 499 N.E.2d 440. This court then considered whether compliance with the TILA was a defense to liability under the Consumer Fraud Act and concluded that the Consumer Fraud Act did not create more extensive disclosure requirements than the TILA.

Rather, we noted "a consistent policy against extending disclosure requirements under Illinois law beyond those mandated" by federal law, in situations where both the TILA and Illinois statutes apply. *Lanier*, 114 Ill.2d at 17, 101 Ill.Dec. 852, 499 N.E.2d 440. Thus, this court held:

> "Because the [Truth in Lending] Act is a law administered by the Federal Reserve Board, we find that, under section 10b(1) of the Consumer Fraud Act, the defendant's compliance with the disclosure requirements of the Truth in Lending Act is a defense to liability under the Illinois Consumer Fraud Act in the present case." *Lanier*, 114 Ill.2d at 18, 101 Ill.Dec. 852, 499 N.E.2d 440.

PMUSA argues that *Lanier* and the policy recognized therein against imposing disclosure requirements beyond those mandated by applicable federal law require the application of the bar of section 10b(1) to plaintiffs' claim. Plaintiffs respond that PMUSA's reliance on *Lanier* is misplaced because the basis of their claim of fraud is not PMUSA's failure to make additional disclosures. Their claim is based on allegations of "active and direct" misrepresentation.

Our decisions since *Lanier* make it clear that mere compliance with applicable federal regulations is not necessarily a shield against liability under the Consumer Fraud Act. For example, in *Martin v. Heinold Commodities, Inc.*, 163 Ill.2d 33, 205 Ill.Dec. 443, 643 N.E.2d 734 (1994), this court held that a broker's failure to reveal certain information in its disclosure statement was not authorized by the Commodity Futures Trading Commission (CFTC) or its regulations and, therefore, could be the basis for liability under the Consumer Fraud Act. The defendant did not fail to accurately disclose the amount of fees it charged investors for processing commodity options contracts. Rather, defendant failed to reveal the true nature of the fees being charged. Specifically, Heinold failed to reveal that the "foreign service fee" it was charging was instead a commission from which it would derive a share

and that the fee was not authorized by the CFTC. *Martin*, 163 Ill.2d at 40-42, 205 Ill.Dec. 443, 643 N.E.2d 734. Citing *Lanier*, Heinold argued that its literal compliance with the disclosure requirements of the CFTC was a complete defense to liability under the Consumer Fraud Act. *Martin*, 163 Ill.2d at 49, 205 Ill.Dec. 443, 643 N.E.2d 734. This court concluded that the deception was "neither specifically authorized by the Commission, nor in compliance with the Commission's regulations." *Martin*, 163 Ill.2d at 50, 205 Ill.Dec. 443, 643 N.E.2d 734. In addition, this court commented that the CFTC itself had noted that "literal compliance" with its disclosure requirements would not "necessarily ensure that a violation of the Commission's regulations has not occurred." *Martin*, 163 Ill.2d at 50, 205 Ill.Dec. 443, 643 N.E.2d 734. The CFTC was on record as stating that "'a customer may be deceived about [material facts] despite receipt of the information required by [the Commission's regulations.]'" *Martin*, 163 Ill.2d at 50, 205 Ill.Dec. 443, 643 N.E.2d 734, quoting *Hammond v. Smith Barney, Harris Upham & Co.* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) par. 24,617 (C.F.T.C. 1990).

In *Jackson*, this court again considered whether a defendant's compliance with its obligations under the TILA provided a defense to a claim under the Consumer Fraud Act. The specific issue was whether the car dealership and Chrysler Financial Corporation, the assignee of the car sales contract, could be held liable when the dealership failed to reveal in the contract that it would retain a substantial portion of the amount charged for an extended warranty rather than transmit the entire amount to the manufacturer. *Jackson*, 197 Ill.2d at 41-42, 258 Ill.Dec. 79, 755 N.E.2d 462. The trial court dismissed the complaint and the appellate court affirmed, relying on *Lanier*. *Jackson*, 197 Ill.2d at 43, 258 Ill.Dec. 79, 755 N.E.2d 462. This court affirmed, following the rule established in *Lanier* and holding that "compliance with the disclosure requirements of TILA is a defense to the Consumer Fraud Act claim against Chrysler [Financial] in this case."

Jackson, 197 Ill.2d at 50, 258 Ill.Dec. 79, 755 N.E.2d 462. In addition, this result was based on an exemption clause in the TILA that exempts assignees from liability under federal law unless the creditor's violation of the TILA is "apparent on the face of the disclosure statement." 15 U.S.C. § 1641(a) (2000). Thus, we held that "an assignee is not responsible for the misrepresentations made by the dealer to the consumer outside of reviewing the face of the assigned document for apparent defects." *Jackson*, 197 Ill.2d at 50, 258 Ill.Dec. 79, 755 N.E.2d 462. In effect, we held that the assignee was "specifically authorized" (815 ILCS 505/10b(1) (West 2000)) to do no more than meet its obligations under section 1641(a) of the TILA.

It is significant that in both *Lanier* and *Jackson*, the holding was limited to the facts of the particular case. *Lanier*, 114 Ill.2d at 18, 101 Ill.Dec. 852, 499 N.E.2d 440 ("in the present case"); *Jackson*, 197 Ill.2d at 50, 258 Ill.Dec. 79, 755 N.E.2d 462 ("in this case"). As we noted in *Jackson*, *Lanier* did "not confer a blanket immunization" from Consumer Fraud Act liability. If the alleged fraud were "active and direct," such as a scheme to make false statements on the financing statement, liability under the Consumer Fraud Act could be imposed. *Jackson*, 197 Ill.2d at 51-52, 258 Ill.Dec. 79, 755 N.E.2d 462. As Justice Kilbride noted in his special concurrence, mere compliance with applicable law does not necessarily bar Consumer Fraud Act liability. Instead, the conduct at issue must be specifically authorized. *Jackson*, 197 Ill.2d at 59, 258 Ill.Dec. 79, 755 N.E.2d 462 (Kilbride, J., specially concurring, joined by Harrison, C.J.).

In *Lanier* and *Jackson*, this court held that full compliance with applicable disclosure requirements is a defense, under section 10b(1), to a claim of fraud based on the failure to make additional disclosures. In the present case, however, the plaintiffs' claim is not based on an alleged failure to disclose and, thus, compliance with disclosure requirements cannot constitute a defense.

Consider, for example, if the alleged fraud was the practice of a cigarette manufacturer to put only 19 cigarettes instead of 20 in every fifth pack of cigarettes. Such a scheme would increase profits by 1% by selling 99 cigarettes instead of the 100 promised on the labels. Without a doubt, the manufacturer would be liable under the Consumer Fraud Act for the fraud, notwithstanding scrupulous compliance with all applicable rules and regulations of the FTC. Such a fraud would be "active and direct." See *Jackson*, 197 Ill.2d at 51-52, 258 Ill.Dec. 79, 755 N.E.2d 462. See also *Hill v. St. Paul Federal Bank for Savings*, 329 Ill.App.3d 705, 713, 263 Ill.Dec. 562, 768 N.E.2d 322 (2002) (rejecting argument that defendant's failure to disclose posting order of checks in its fee schedule was deceptive, even if in compliance with federal law, because the Consumer Fraud Act does not require more extensive disclosure than that required by the TILA).

Plaintiffs' claim in the present case is that the use of the terms "lights" and "lowered tar and nicotine" on PMUSA's packaging and in its advertising is every bit as false as the package label that promises 20 cigarettes but delivers only 19. Plaintiffs argue that *Martin* should control the result in this case because the use of these terms has not been specifically authorized by the FTC and was not done in compliance with FTC rules. We conclude that *Martin* does not provide the answer; it merely helps us formulate the dispositive question. Unless the use of these terms has been specifically authorized by the FTC, section 10b(1) of the Consumer Fraud Act does not exempt PMUSA from liability.

The circuit court, in rejecting PMUSA's section 10b(1) defense, relied on *Aurora Firefighter's Credit Union v. Harvey*, 163 Ill.App.3d 915, 114 Ill.Dec. 873, 516 N.E.2d 1028 (1987). After the credit union brought a collection action against the guarantor of a loan, he raised affirmative defenses and filed counterclaims under the TILA, the Consumer Fraud Act, and the Deceptive Practices Act. *Aurora Firefighter's*, 163 Ill.App.3d at 918, 114 Ill.Dec.

873, 516 N.E.2d 1028. With regard to his counterclaim that the credit union failed to make required disclosures under the TILA, the court held that the TILA requires disclosure only to the borrower, not to the guarantor, in a credit transaction. *Aurora Firefighter's*, 163 Ill.App.3d at 919, 114 Ill.Dec. 873, 516 N.E.2d 1028. With regard to his counterclaims under the Consumer Fraud Act and Deceptive Practices Act, the court agreed with the credit union it could not be held liable because its alleged failure to disclose was both authorized by and in compliance with the TILA. *Aurora Firefighter's*, 163 Ill.App.3d at 921-22, 114 Ill.Dec. 873, 516 N.E.2d 1028. However, the court further held that the defendant should be allowed to assert defenses under the Consumer Fraud Act and the Deceptive Practices Act based on alleged abuses other than disclosure violations. *Aurora Firefighter's*, 163 Ill.App.3d at 926, 114 Ill.Dec. 873, 516 N.E.2d 1028. Rejecting the credit union's reliance on its regulation by and compliance with the Credit Union Act, the court stated that the mere existence of such a statute does not create "a blanket exemption" for credit unions from the operation of the Consumer Fraud Act.

We conclude that the present case can be distinguished from *Lanier* and its progeny because it does not involve the alleged lack of disclosure in the context of loans, leases, or other transactions. Rather, this case involves the use of allegedly deceptive terms in the name and description of a consumer product. That is, this is not a case in which the plaintiff argues that the defendant should have made disclosures in addition to the disclosures specifically required by the applicable regulations. In the present case, the question is whether the FTC specifically authorized the use of the disputed terms.

Despite this distinction, *Lanier* and its progeny, including the case upon which the circuit court relied, do stand for three separate propositions that are relevant to the present case. First, if section 10b(1) is to apply to bar a claim, the authorization relied upon must come from a

state or federal regulatory body. See *Lanier*, 114 Ill.2d at 13, 101 Ill.Dec. 852, 499 N.E.2d 440 (the Federal Reserve Board "is the agency empowered by Congress to prescribe implementing and interpretive regulations" for the TILA); *Lanier*, 114 Ill.2d at 18, 101 Ill.Dec. 852, 499 N.E.2d 440 (applying section 10b(1) because the TILA is "a law administered by the Federal Reserve Board). See also *Datacom Systems*, 146 Ill.2d at 33, 165 Ill.Dec. 655, 585 N.E.2d 51 (defendant corporation, which engaged in impermissible conduct while attempting to collect unpaid parking fines under a contract with the City of Chicago, was not exempt under section 10b(1) of the Consumer Fraud Act; although hired by the city to perform this function, its "actions were not specifically authorized by any laws administered by a regulatory body acting under statutory authority of this State").

Second, such a regulatory body may specifically authorize conduct by regulated entities without engaging in formal rulemaking. A Federal Reserve Board staff interpretation, for example, may be a sufficient basis for a finding of specific authorization. See *Lanier*, 114 Ill.2d at 13, 101 Ill.Dec. 852, 499 N.E.2d 440 (agency is "entitled to the greatest respect in the interpretation of its own regulations"; and noting that both Congress and the Supreme Court have expressed approval for treating staff interpretations as authoritative).

Third, while the authorization must be specific-related to a particular thing – it need not be express. Thus, in *Lanier*, full compliance with disclosure requirements of the TILA was a defense to liability because the required disclosure implicitly provided specific authorization not to make any additional disclosures. *Lanier*, 114 Ill.2d at 17, 101 Ill.Dec. 852, 499 N.E.2d 440. Neither the rules nor the staff interpretation of the Federal Reserve Board expressly stated that lenders need not disclose the effect of the Rule of 78s; rather, the regulatory body dictated the content of the required disclosure, implying that no addi-

tional disclosure was necessary and, thus, specifically authorizing lenders not to disclose the information.

Although there is extensive Illinois case law dealing with applicability of section 10b(1) in the context of financial transactions where the alleged fraud is related to the issue of disclosure, this case involves alleged fraud in the advertising and promotion of a consumer product. It also requires us to delve deeply into the functions and actions of a federal agency. For these purposes, we turn to other authorities.

4. *Other Authorities*

We look to the FTC's own published materials and cases from the United States Supreme Court and the federal courts for additional authority in our effort to determine what constitutes "specific authorization" and whether PMUSA used the terms "lights" and "lowered tar and nicotine" under such authority.

PMUSA argues that, over the years, the FTC used a number of mechanisms to regulate and to authorize the making of claims regarding the tar and nicotine content of cigarettes. These include formal agency rulemaking, the issuance of advisory opinions, the use of voluntary agreements with cigarette manufacturers to obviate the need for rulemaking, and the initiation of enforcement proceedings against an individual manufacturer. Such enforcement proceedings might result in a judgment against the particular manufacturer or in the entry of a consent order. Although the consent order may be enforced only against the party who agreed to the terms of the order, PMUSA asserts that an enforcement action against one industry actor is an "especially effective method of regulation" that the FTC employs "to announce to an entire industry what behavior is and is not authorized."

Thus, PMUSA argues, American Brands was specifically authorized by the 1971 consent order to use the terms "low," "lower," "reduced," or "like qualifying terms" in its advertising and packaging to describe the level of tar and nicotine in its cigarettes, so long as it also pro-

vided the actual measurement of the level in milligrams. *American Brands*, 79 F.T.C. 255. Similarly, the 1995 consent order prohibited American Tobacco Company from representing the tar and nicotine levels of Carlton cigarettes by using "a numerical multiple, fraction or ratio" of the tar or nicotine levels of other brands or by depicting more than one pack of Carltons versus one pack of any other brand. The agreed order provided, further, that "presentation of the tar and/or nicotine ratings of any of respondent's brands of cigarettes and the tar and/or nicotine ratings of any other brand (with or without an express or implied representation that respondent's brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine) shall not be deemed" to violate the ban on numerical comparisons. *American Tobacco*, 119 F.T.C. at 11. Both consent orders, PMUSA argues, specifically authorized other members of the tobacco industry to act in accordance with their terms.

This assertion is supported by the FTC's own statements and actions. In 1964, the FTC announced the promulgation of a trade regulation rule requiring the disclosure on all cigarette packaging of the fact that "cigarette smoking is dangerous to health and may cause death from cancer and other diseases." Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed.Reg. at 8325. This rule was rendered unnecessary the following year with the enactment of the Labeling Act. However, the FTC's "Statement of Basis and Purpose of the Trade Regulation Rule" (Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed.Reg. at 8325-75 (hereinafter 1964 FTC Statement)), contains valuable insights into the FTC's use of rulemaking and adjudication in the regulatory process.

The 1964 FTC Statement offers "ten reasons why a formal rule-making proceeding may be preferable to an adjudicative proceeding, or a series of adjudicative proceedings." 1964 FTC Statement, 29 Fed.Reg. at 8368. Among these reasons are: in formal rulemaking proceed-

ings, all interested persons are given an opportunity to be heard; the rules of evidence and other procedural safeguards that operate in the adjudicative process are not tailored to the needs of rulemaking; and rulemaking through adjudication may be a more costly and time-consuming means of dealing with a problem common to an entire industry. 1964 FTC Statement, 29 Fed.Reg. at 8366-68. Nevertheless, the Statement clearly reveals that the FTC considered the adjudicative process as an alternative means of rulemaking:

> "Rule-making through adjudication is not always completely fair and even handed in its results. This is especially true where a practice sought to be eliminated is industry-wide and the agency sues the members of the industry one-by-one to stop the practice." 1964 FTC Statement, 29 Fed.Reg. at 8367.

In addition,

> "The focus in adjudication is on settling a dispute over past practices, and while a rule may be announced in the process, it tends to be done incidentally and without sufficient concern for laying down clear guidelines for the future. Most often, rules contained in adjudicative decisions, whether judicial or administrative, are not designated as rules or stated in the form of rules. The rule must be inferred from the language of the opinion and the facts of the case; it is implicit rather than explicit; and it may remain uncontroversial and uncertain until many subsequent adjudications have refined and clarified it. It may take a long time for a rule even to be recognized and understood as such." 1964 FTC Statement, 29 Fed.Reg. at 8367.

Despite these concerns, however, the FTC did not repudiate adjudication as a regulatory tool:

> "We do not suggest, however, that the agencies in general, or the Federal Trade Commission in particular, should abandon reliance on the adjudicative

> method in all situations where a substantive principle or standard of conduct having general application is to be declared. The force of each of the [10] reasons discussed above varies with the concrete situation in which a choice between approaches is presented. That is why the supreme court has held that the choice between rule-making and adjudicative proceedings is ordinarily within the agency's discretion." 1964 FTC Statement, 29 Fed.Reg. at 8368, citing *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 202, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995, 2002 (1947).

The 1964 FTC Statement did not mention the use of advisory opinions or the resolution of adjudicative actions by consent order. However, the expressed concern about the ability of regulated entities to discern clear rules from the opinions rendered after adjudication is not present when the enforcement action is resolved by entry of a consent order. Such an order is clearly intended to serve as a rule, at least with respect to the parties to the consent order. The question for this court is whether the entry of a consent order, expressly directing one industry member to behave in a certain way, is an implicit authorization for other industry members to conduct themselves in the same manner. The FTC's observation that adjudication could be used to announce "a substantive principle or standard of conduct having general application" suggests that a consent order may serve as authorization for nonparties to the order to follow its directives.

The United States Supreme Court has considered the role of adjudication as a means of establishing agency policy. *Bell Aerospace* involved a dispute between an employer and a union over the proper classification of certain buyers within the company's purchasing procurement department. *Bell Aerospace*, 416 U.S. at 269, 94 S.Ct. at 1759, 40 L.Ed.2d at 140. The National Labor Relations Board (NLRB) determined that the buyers were not managerial employees and, therefore, were entitled to the

protections of the National Labor Relations Act. *Bell Aerospace*, 416 U.S. at 288-89, 94 S.Ct. at 1768-69, 40 L.Ed.2d at 150-51. The Court of Appeals held, *inter alia*, that although the NLRB was not precluded from determining that some buyers or all buyers were not managerial employees, it could not do so without invoking its rulemaking procedures under the National Labor Relations Act. *Bell Aerospace*, 416 U.S. at 290, 94 S.Ct. at 1770, 40 L.Ed.2d at 152. The Supreme Court reversed in part, disagreeing with this portion of the appellate court's holding. *Bell Aerospace*, 416 U.S. at 294, 94 S.Ct. at 1771-72, 40 L.Ed.2d at 154.

As noted above, PMUSA cites *Bell Aerospace* for the proposition that "'[A]djudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein.'" *Bell Aerospace*, 416 U.S. at 294, 94 S.Ct. at 1771, 40 L.Ed.2d at 153-54, quoting *Wyman-Gordon*, 394 U.S. at 765, 89 S.Ct. at 1429, 22 L.Ed.2d at 714-15. The Supreme Court also stated in that case that the NLRB was "not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the [NLRB's] discretion." *Bell Aerospace*, 416 U.S. at 294, 94 S.Ct. at 1771, 40 L.Ed.2d at 154.

Bell Aerospace, therefore, offers some support for PMUSA's contention that the 1971 and 1995 consent orders could be the source of specific authorization for the conduct described therein. The Court in *Bell Aerospace*, however, emphasized the importance of a regulatory agency to have the ability to make case-by-case determinations when the question is such that it would be of marginal utility to announce a generalized standard for an entire industry. *Bell Aerospace*, 416 U.S. at 294, 94 S.Ct. at 1771-72, 40 L.Ed.2d at 154. Thus, the Court observed, "'an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to

exalt form over necessity.'" (Emphasis omitted.) *Bell Aerospace*, 416 U.S. at 293, 94 S.Ct. at 1771, 40 L.Ed.2d at 153, quoting *Chenery*, 332 U.S. at 202, 67 S.Ct. at 1580, 91 L.Ed. at 2002. *Bell Aerospace*, however, offers little support for PMUSA's contention that the 1971 and 1995 consent orders resolving disputes between the FTC and individual tobacco companies should be deemed by this court to specifically authorize PMUSA or other cigarette manufacturers to follow the directives contained in the orders.

PMUSA also points to numerous documents in the record that, it contends, reveal that the FTC itself considers the resolution of adjudicated cases, either by judgment or by consent order to constitute "regulatory activity." See, *e.g.*, Federal Trade Commission, Report to Congress Pursuant to the Public Health Cigarette Smoking Act, at 13-14 (December 31, 1971) (describing the resolution of the *American Brands* dispute via consent order and its "extended negotiations" with "six proposed respondents" in the *Lorillard* matter as part of its "[r]egulatory activity" for the year); Federal Trade Commission, Report to Congress Pursuant to the Public Health Cigarette Smoking Act, at 1 (December 31, 1972) (noting that by October of 1972 "almost all cigarette advertising published in this country was in compliance with the terms of consent orders" directly involving only six cigarette companies). PMUSA's characterization of the documentary record is consistent with the testimony of Dr. Peterman, a former FTC bureau director, who stated that the FTC uses consent orders to provide guidance to the entire cigarette industry.

We conclude that the FTC's informal regulatory activity, including the use of consent orders, comes within the scope of section 10b(1)'s requirement that the specific authorization be made "by laws administered by" a state or federal regulatory body. 815 ILCS 505/10b(1) (West 2000). This is consistent with our holding in *Lanier*, which found specific authorization for the challenged con-

duct in an agency staff interpretation (*Lanier*, 114 Ill.2d at 17, 101 Ill.Dec. 852, 499 N.E.2d 440), and with the plain meaning of the statute and the public policy expressed by the legislature.

The United States Court of Appeals for the Seventh Circuit, applying Illinois law in the case of *Bober v. Glaxo Wellcome PLC*, 246 F.3d 934 (7th Cir.2001), cited in *Avery v. State Farm Mutual Insurance Co.*, 216 Ill.2d 100, 194, 296 Ill.Dec. 448, 835 N.E.2d 801 (2005), found that the plaintiff's claim was properly dismissed by the district court because it was, as a matter of law, not deceptive under the Consumer Fraud Act. *Bober*, 246 F.3d at 940. However, because one member of the panel disagreed with this holding, the court made an alternate holding affirming the district court's conclusion that the plaintiff's claim was barred by section 10b(1) of the Consumer Fraud Act. *Bober*, 246 F.3d at 941 n.4.

Bober, like the present case, involved a claim of fraud in the marketing of a consumer product. The defendant drug company marketed both over-the-counter and prescription forms of the drug ranitidine, which is a stomach acid reliever. By means of its consumer hotline and other marketing practices, Glaxo indicated to Bober and other consumers that the two medicines, known as Zantac 75 and Zantac 150, were not substitutable. *Bober*, 246 F.3d at 936-37. In fact, although the two products contained exactly the same medication, the cost to consumers of one tablet of Zantac 150 was almost twice the cost of two 75 milligram tablets of Zantac 75. *Bober*, 246 F.3d at 937. Plaintiff filed a claim under the Consumer Fraud Act, alleging that Glaxo's statements that the two products were not readily substitutable were deceptive and caused consumers to pay an inflated price. *Bober*, 246 F.3d at 937-38.

The court noted that the "case law interpreting the relevant portion of the [Consumer Fraud Act's] exemption provision is not entirely clear on the question of what is meant by 'specifically authorized.'" *Bober*, 246 F.3d at

940. After reviewing this court's decisions in *Martin*, 163 Ill.2d 33, 205 Ill.Dec. 443, 643 N.E.2d 734 (discussed in detail, above), and *Weatherman v. Gary-Wheaton Bank of Fox Valley*, 186 Ill.2d 472, 239 Ill.Dec. 12, 713 N.E.2d 543 (1999) (compliance with federal statute is defense to Consumer Fraud Act liability when the statute specifically authorizes the making of a good faith estimate of fees), the Seventh Circuit concluded that:

> "Taken together, the [Illinois] cases stand for the proposition that the state [Consumer Fraud Act] will not impose higher disclosure requirements on parties than those that are sufficient to satisfy federal regulations. If the parties are doing something specifically authorized by federal law, section 10b(1) will protect them from liability under the [Act]. On the other hand, the [Consumer Fraud Act] exemption is not available for statements that manage to be in technical compliance with federal regulations, but which are so misleading or deceptive in context that federal law itself might not regard them as adequate." *Bober*, 246 F.3d at 941.

The Seventh Circuit defined the issue as "whether the statements Bober complains of are sufficiently within what is authorized by federal law that Glaxo is entitled to section 10b(1) protection." *Bober*, 246 F.3d at 941. The only statement that the court found "potentially misleading" (*Bober*, 246 F.3d at 941) was the statement of Glaxo's hotline operator, who told Bober that the two tablets were "not the same medications" and that he "could not substitute two Zantac 75 tablets for one Zantac 150 tablet." *Bober*, 246 F.3d at 937.

The statement that the two dosages of the same drug were "not the same medication" was found to be specifically authorized by a rule formally adopted by the FDA and codified in the Code of Federal Regulations. *Bober*, 246 F.3d at 941. The exemption of section 10b(1) applied to this statement, the court stated, "even if the statement

may have led Mr. Bober as a layperson to misunderstand what was being said." *Bober*, 246 F.3d at 941.

The second part of the operator's statement regarding the nonsubstitutability of the two tablets was "not so easily dealt with" because "Glaxo was required by federal law to say a certain amount and simultaneously required not to say too much." *Bober*, 246 F.3d at 942. Although the applicable regulations did not expressly authorize Glaxo to answer a consumer's question with the statement "you cannot substitute," the statement was consistent with federal regulations prohibiting drug companies from suggesting "off-label" uses for its products. *Bober*, 246 F.3d at 942.

In the end, even though there was no express authorization for the "cannot substitute" statement, the Seventh Circuit concluded that what Glaxo "chose to say and not to say was a sufficiently careful compromise to fall within what is specifically authorized by federal law." *Bober*, 246 F.3d at 942. The court explained further:

> "The pharmaceutical industry is highly regulated, both at the federal level and internationally. Technical requirements abound, and it is not only possible but likely that ordinary consumers will find some of them confusing, or possibly misleading as the term is used in statutes like Illinois's [Consumer Fraud Act]. But, recognizing the primacy of federal law in this field, the Illinois statute itself protects companies from liability if their actions are authorized by federal law. (Such protection would amount to nothing if it applied only to statements that were not susceptible to misunderstanding; those statements would escape liability under the [Consumer Fraud Act] in any event.) Because Glaxo's statements fall within the boundaries established by federal law, under *Weatherman* [186 Ill.2d 472, 239 Ill.Dec. 12, 713 N.E.2d 543] and *Martin* [163 Ill.2d 33, 205 Ill.Dec. 443, 643 N.E.2d 734] they are enti-

tled to protection under section 10b(1) of the [Consumer Fraud Act]." *Bober*, 246 F.3d at 942-43.

Bober is particularly helpful to our analysis of the present case, because, unlike *Lanier*, 114 Ill.2d 1, 101 Ill.Dec. 852, 499 N.E.2d 440, *Martin*, 163 Ill.2d 33, 205 Ill.Dec. 443, 643 N.E.2d 734, and *Jackson*, 197 Ill.2d 39, 258 Ill.Dec. 79, 755 N.E.2d 462, it does not concern federal disclosure requirements. Like the present case, it concerns whether the federal regulatory agency has specifically authorized the making of certain statements about the product. The Seventh Circuit has read the statutory term "specifically authorized by laws administered by" in section 10b(1) to encompass the making of statements that "fall within the boundaries established by federal law" (*Bober*, 246 F.3d at 943) in a highly regulated industry, even if those statements may tend to be confusing or misleading and even if there is no express authorization for the making of such statements in the applicable federal regulations. This is entirely consistent with our previous decisions, our reading of the statutory language, and our understanding of the legislative policy underlying section 10b(1).

The United States Court of Appeals for the District of Columbia Circuit long ago noted the FTC's tendency to regulate by obtaining voluntary compliance with its policies, rather than engaging in formal rulemaking. See *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 995 (D.C.Cir.1973) (noting that, due to its "expertise in dealing with commercial practices," the FTC is able to secure "voluntary compliance through informal proceedings," and, in its sound discretion, determines when "formal enforcement measures" are necessary; and, further, that Congress has "voiced approval" of the FTC's "record in shaping the fluid contours of generalized statutory policy pronouncements into meaningful and coherent rules of business conduct"). In reaching its holding that the FTC Act did not create a private cause of action under which that the *Holloway* plaintiffs could bring their claim, the

court of appeals provided a detailed history of the FTC Act and its amendments and of the FTC itself. The court noted that when considering the 1939 amendments to the FTC Act, Congress made a fundamental policy judgment regarding the FTC's "expertise in dealing with commercial practices, its ability to act as a buffer in securing voluntary compliance through informal proceedings, and its sound discretion in determining when formal enforcement measures were necessary." *Holloway*, 485 F.2d at 995. *Holloway* also offers support for the conclusion that the consent orders obtained by the FTC with respect to one industry member provided specific authorization for other industry members to act in conformity with those orders.

Finally, although lacking in significant precedential weight, we note with great interest the memorandum opinion and order of the federal district court for the Eastern District of Arkansas in *Watson v. Philip Morris Cos.*, No. 4:03-CV-519 GTE, 2003 WL 23272484 (E.D.Ark., December 12, 2003), *aff'd*, 420 F.3d 852 (8th Cir.2005). The *Watson* class of plaintiffs was comprised of smokers who had consumed at least one pack of Marlboro Lights during the six years prior to the filing of their action pursuant to the Arkansas Deceptive Trade Practices Act (Ark. Code Ann. § 4-88-107). The substance of their complaint was that Philip Morris advertised Marlboro Lights as being lighter or lower in tar, despite the fact that the cigarettes actually delivered more tar and nicotine than shown by the FTC testing method. Philip Morris removed the action to federal court pursuant to 28 U.S.C. § 1442(a)(1) (2000), on the basis that it had raised a colorable federal defense to the plaintiffs' claims. Specifically, Philip Morris argued that its actions were at the direction of a federal agency – the FTC – and that there was a causal nexus between the FTC's actions and Philip Morris' marketing practices with regard to light cigarettes. The district court denied the plaintiffs' motion to remand the matter back to state court.

For our purposes, the relevant portion of the *Watson* decision is the district court's discussion of the FTC's regulation of advertising of light and low tar cigarettes and the FTC's use of mechanisms other than formal rules to direct the actions of regulated entities.

After an exhaustive recounting of the history of regulation of cigarette advertising, the district court noted that Philip Morris was not required to advertise its cigarettes as "light" or "low tar." Nevertheless, the court acknowledged:

> "[Philip Morris] is permitted by the FTC to so advertise its cigarettes if they meet the FTC's standard. Philip Morris is required to adhere to the FTC's regulation of 'lights' advertising. The FTC requires disclosure of Cambridge Filter Method tar and nicotine ratings in cigarette advertisements, and has stated that a cigarette may be advertised as light if its rating using the FTC Method is less than 15mg using the FTC Method. Therefore, any contention that Philip Morris' advertising of these two cigarette brands as 'Lights' is misleading squarely confronts the FTC's mandate that cigarette companies disclose FTC Method results in their advertising and use the Method to determine whether a particular cigarette may be classified as 'Light.'" *Watson*, No. 4:03-CV-519 GTE.

The district court also observed that a "formal rule is not required in order for a federal agency to direct the actions of a private company." The FTC "often regulates the industries it governs by compelling voluntary agreements and consent orders rather than promulgating formal rules." In reaching this conclusion, the district court relied upon a documentary record similar to the record in the present case. In addition, the district court cited the 1987 testimony before Congress of then-chairman of the FTC Daniel Oliver, in which he described the FTC's preference for informal regulation via the use of enforcement actions and consent orders rather than formal rulemak-

ing. Oliver stated that it is "more efficient" to bring a single case against one industry actor than to use scarce resources to engage in rulemaking and that in "the case of the cigarette industry," it was "entirely reasonable to suppose that one action against [one] cigarette company would have an effect on all of them, and that you would not have to make a rule." Quoting Statement of Daniel Oliver, Chairman of the Federal Trade Commission, Hearing before the Subcommittee on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce, 100th Cong. 17-19 (1987).

The *Watson* court noted that the FTC coerced Philip Morris and other cigarette manufacturers into "voluntary" cooperation with its cigarette labeling and advertising policies "in such a way that a formal rule" was not required to create federal jurisdiction. Finally, although formal rulemaking "may be one of the principal ways federal agencies regulate," "it is clearly not the only way. In the FTC's case, it is not even the preferred way to regulate the cigarette industry."

The issue addressed by the *Watson* court – whether removal to federal court was proper – has no bearing on the present case. However, the federal district court's detailed analysis does support our conclusion that specific authorization for the use of the disputed descriptors may be found in consent orders rather than in formally promulgated trade regulation rules of the FTC.

5. *Summary*

Based on these other authorities, read in conjunction with Illinois law, we conclude that the FTC could, and did, specifically authorize all United States tobacco companies to utilize the words "low," "lower," "reduced" or like qualifying terms, such as "light," so long as the descriptive terms are accompanied by a clear and conspicuous disclosure of the "tar" and nicotine content in milligrams of the smoke produced by the advertised cigarette. See *American Brands*, 73 F.T.C. 255. Further, the FTC reiterated this authorization in the 1995 consent order, which for-

bade the representation of tar ratings as "a numerical multiple, fraction or ratio of the tar or nicotine ratings of any other brand," but specifically allowed the "express or implied representation" that a cigarette is "'low,' 'lower,' or 'lowest' in tar and/or nicotine." *American Tobacco*, 119 F.T.C. at 10, 11. Thus, we hold that plaintiffs' claim is barred by section 10b(1) of the Consumer Fraud Act.

At oral argument, plaintiffs' counsel noted that the circuit court made two separate findings of fraud: (1) a finding that PMUSA's use of the terms "light" and "lowered tar and nicotine" was fraudulent and deceptive based on the known phenomenon of compensation, and (2) a finding that the members of the plaintiff class were defrauded because PMUSA failed to disclose that its "light" cigarettes were more mutagenic than full-flavor cigarettes. Counsel argued that, even if this court were to reverse on the merits of the first claim, the second portion of the circuit court's judgment must still stand.

We have not reached the merits of either aspect of plaintiffs' fraud claim, having found the entire claim barred by section 10b(1) of the Consumer Fraud Act. However, our discussion thus far has focused on the PMUSA's use of the disputed terms. The question we must next address is whether, even if the use of the terms was specifically authorized by the FTC, a claim may be brought under the Consumer Fraud Act based on PMUSA's describing more mutagenic cigarettes as "light" and as delivering "lower tar and nicotine." For two reasons, we find that the claim of fraud based on increased mutagenicity cannot stand.

First, plaintiffs' claim regarding mutagenicity is inextricably linked to their claim that the terms "lights" and "lowered tar and nicotine" are fraudulent and deceptive. Even though the circuit court found that members of the plaintiff class understood these terms as making an implied claim of safety and relied on this understanding, their Consumer Fraud Act claim is barred by section 10b(1). It is clear from the record that the FTC has de-

fined both terms as meaning 15 milligrams or less of tar. Because PMUSA was specifically authorized to use these descriptive terms on its labels and in its advertising of products meeting this definition, any claim based on the use of these terms is barred by section 10b(1) of the Consumer Fraud Act, no matter what meaning the plaintiffs might have attributed to them.

Second, plaintiffs' mutagenicity claim is based on PMUSA's failure to make additional disclosures beyond those required by federal statute and the voluntary agreement with the FTC – the tar and nicotine content in milligrams and the mandatory warning label. Thus, the claim is barred by this court's decisions in *Lanier*, 114 Ill.2d at 18, 101 Ill.Dec. 852, 499 N.E.2d 440 (finding compliance with disclosure requirements of federal statute to be a defense to liability under the Consumer Fraud Act), *Jackson*, 197 Ill.2d at 47, 258 Ill.Dec. 79, 755 N.E.2d 462 (same), and *Jarvis*, 201 Ill.2d at 88, 265 Ill.Dec. 877, 773 N.E.2d 641 (recognizing state policy against extending consumer disclosure requirements beyond those mandated by federal law).

IV. OTHER ISSUES RAISED IN THIS APPEAL

Our resolution of plaintiffs' claim on the threshold issue of statutory exemption moots most of the other issues raised in this appeal. One issue, however, is not resolved by our determination that plaintiffs' claim is barred by section 10b(1) of the Consumer Fraud Act. PMUSA argues that the circuit court erred by ruling that its delivery of some 39,000 documents to Congress in compliance with a congressional subpoena constituted waiver of both attorney-client privilege and work-product protection for those documents. Although only one of the disputed documents was actually admitted into evidence in the present case, PMUSA urges this court to reverse the circuit court's ruling on the issue. PMUSA's concern is that if it does not raise the issue in this appeal, it may be estopped from doing so in subsequent litigation in which

an adverse party seeks to admit these documents into evidence.

Despite plaintiffs' well-supported arguments in favor of upholding the circuit court's determination, we decline to address the issue except to note that PMUSA did make the privilege argument before this court and, thus, cannot be deemed to have acquiesced in the admission of the single document into evidence in this case.

Several of the other issues raised in this appeal are of great importance and deserving of consideration by this court in the proper case. In particular, the circuit court's certification of a plaintiff class of 1.14 million individuals with claims covering decades raises several significant issues. The circuit court found sufficient commonality of issues to certify the class. Citing *Oliveira*, 201 Ill.2d at 155, 267 Ill.Dec. 14, 776 N.E.2d 151, in which this court held that the proximate cause element of a Consumer Fraud Act claim must be met by proof of a plaintiff's having been deceived in some manner, PMUSA argues that the element of causation is an individualized issue that makes class certification improper.

We note that the five common questions of fact justifying class certification that were enumerated by the circuit court in its judgment order do not correspond to the five elements of a private cause of action under the Consumer Fraud Act that this court has repeatedly spelled out. See *Zekman v. Direct American Marketers, Inc.*, 182 Ill.2d 359, 373, 231 Ill.Dec. 80, 695 N.E.2d 853 (1998); *Oliveira*, 201 Ill.2d at 149, 267 Ill.Dec. 14, 776 N.E.2d 151. Specifically, although the circuit court considered what the class members understood the terms "lights" and "lowered tar and nicotine" to mean, and whether PMUSA intended reliance on its allegedly false and misleading statements, and whether the class members sustained damages as a result, it did not make the specific inquiry required by *Oliveira* – whether the members of the plaintiff class were deceived by the use of the terms. That is, did they hold a false impression intentionally created by PMUSA's use of

these terms when they made each and every purchase decision over a period of as long as 30 years?

Similarly, in the portion of the judgment order listing five elements of a claim under the Consumer Fraud Act, the circuit court cites *Oliveira* as the source for the elements, but does not mention actual deception as a necessary finding under the element of proximate cause. However, in making its factual findings as to each element, the circuit court did find that the false message of lighter smoke and lower tar was "relied upon as a causative or determining factor for all Class members even if the degree or extent may have varied between Class members."

In the present case, the causation issue has at least two aspects. First, to meet the causation element of a Consumer Fraud Act claim (*Oliveira*, 201 Ill.2d at 154, 267 Ill.Dec. 14, 776 N.E.2d 151), the members of the class must have actually been deceived in some manner by the defendant's alleged misrepresentations of fact. In *Oliveira*, this court equated cause-in-fact with deception. *Oliveira*, 201 Ill.2d at 150, 267 Ill.Dec. 14, 776 N.E.2d 151. In the context of a fraud claim, as in a negligence claim, cause-in-fact is "but for" cause. That is, the relevant inquiry is whether the harm would have occurred absent the defendant's conduct. *Evans v. Shannon*, 201 Ill.2d 424, 434, 267 Ill.Dec. 533, 776 N.E.2d 1184 (2002). The circuit court's use of the words "may have relied to different degrees" causes us to question the existence of cause-in-fact. Even if, as the circuit court found, every purchaser must have relied to some degree on the disputed language, perhaps upon making the first purchases of a light cigarette, we question whether it can reasonably be said that the words "light" and "lowered tar and nicotine" actually deceived over a million people for decades.

The circuit court cited *Leonardi v. Loyola University of Chicago*, 168 Ill.2d 83, 212 Ill.Dec. 968, 658 N.E.2d 450 (1995), for the proposition that "[a] person is liable for his or her conduct whether it contributed wholly or partly to the plaintiffs' injury as long as it was one of the proximate

causes of the injury." *Leonardi*, however, was a medical malpractice action in which the question was whether the defendant hospital and physicians could admit evidence of the alleged negligence of another physician who was not a party to the suit to demonstrate lack of proximate cause. *Leonardi*, 168 Ill.2d at 91, 212 Ill.Dec. 968, 658 N.E.2d 450. Unlike *Leonardi*, the present case does not involve the apportionment of causation among multiple tortfeasors. The question is not whether PMUSA's use of the descriptors was "one of the proximate causes" of plaintiff's injury. Again, the question is whether it can reasonably be said that deception created by the presence of the words "Lights" and "lowered tar and nicotine" on packages of Marlboro Lights and Cambridge Lights was the "but for" cause of millions of purchasing decisions made over a period of some 30 years by the 1.14 million members of the plaintiff class.

We question, for example, whether all or most of the young people who began smoking long after these products were brought to market were deceived by the disputed words when choosing these brands of cigarettes. It may be just as likely that peer group pressure was the proximate cause of their adopting Marlboro Lights as their preferred brand. Similarly, there is no way of knowing how many smokers first tried Marlboro Lights because they were deceived by the promised lower level of tar, then tried one or more other brands, only to return to Marlboro Lights as a matter of personal preference.

Second, a great deal of evidence was presented on the phenomenon of compensation, which is the term applied to the tendency of smokers to change their smoking behavior after switching to a lower tar and nicotine product in order to achieve the level of nicotine delivery that they had become accustomed to. The circuit court concluded, based on the testimony of plaintiffs' experts, that plaintiffs demonstrated that compensation is "complete." That is, that every smoker compensates fully for the effects of the lowered tar and nicotine cigarette. However, even if

this is true with respect to smokers of full-flavor cigarettes who switch to the so-called "light" or "low tar" brands, we question whether the members of the class who never smoked prior to smoking Marlboro Lights would have felt the need to compensate when they lacked a prior habit to compensate for.

In addition to our reservations about the existence of individual issues that might make class certification inappropriate, we have grave reservations about the novel approach to the calculation of damages that was offered by the plaintiffs and accepted by the circuit court.

However, despite the importance of these questions and the parties' having thoroughly briefed and argued them, we decline to address them. Because we have resolved this appeal on the threshold question of a statutory bar to maintaining the action, these are issues for another day.

V. CONCLUSION

Plaintiffs note that the FTC has never adopted a trade regulation rule approving the use of descriptors such as "light" or "low tar," and that the FTC has never stated that the use of such descriptors has been "substantiated" by any cigarette manufacturer. Further, plaintiffs argue that PMUSA has never claimed to have any proof that its "Lights" are safer than regular cigarettes. These statements are true, but do not resolve the question whether the FTC has specifically authorized the use of these terms. Plaintiffs also assert that the FTC has, fairly recently and after entering into the consent orders, expressly disavowed any "official" definitions of the terms. See Cigarette Testing, Request for Public Comment, 62 Fed.Reg. 48,158, 48,163 (September 12, 1997) ("There are no official definitions for these terms but they appear to be used by the industry to reflect ranges of FTC tar ratings"). It is not clear to this court what the FTC meant by "no official definitions," unless it was referring to the absence of a trade regulation rule. The FTC itself certainly uses these terms in its publications and its reports to Congress. Perhaps the FTC's published definitions of

these terms in these contexts are considered by the agency to be "unofficial."

We conclude that the specific authorization required to trigger the exemption of section 10b(1) does not require formal rulemaking or official definitions. See *Lanier*, 114 Ill.2d at 12-13, 101 Ill.Dec. 852, 499 N.E.2d 440 (finding specific authorization in Federal Reserve Board staff interpretation of the applicable regulation). It is sufficient if the authorization proceeds from regulatory activity, including the resolution of an enforcement action by means of a consent order. The consent order provides express authority for the party that was the target of the enforcement action to engage in the conduct described in the consent order. In addition, a consent order entered into by the FTC with one member of a regulated industry, which is published pursuant to statute, provides implied authority for other members of the regulated industry to engage in the same conduct. It would elevate form over substance to say that FTC specifically authorized American Brands to use such descriptors so long as certain conditions were met (*American Brands*, 79 F.T.C. 255), but did not thereby specifically authorize other members of the industry to act accordingly. Thus, while the authorization given to American Brands was express, the authorization given to the rest of the industry was implied, but no less specific.

The necessary degree of specificity is provided by the language of the consent orders and by the FTC's long-standing use, if not formal adoption, of the definition of "low tar" as meaning 15 milligrams or less of tar per cigarette.

Because PMUSA was specifically authorized to use the disputed terms without fear of the FTC challenging them as deceptive or unfair, it is exempt from civil liability under 10b(1) of the Consumer Fraud Act for the use of the terms so long as the other conditions set out in the consent orders were met. We find no evidence in the record

that PMUSA failed to use these terms in compliance with the terms of the consent orders.

The increased mutagenicity of the smoke delivered by Marlboro Lights and Cambridge Lights cannot be a separate basis for a claim under the Consumer Fraud Act because, even if the terms "light" and "lowered tar and nicotine" do convey a message of safety, their use is specifically authorized by the FTC. In addition, any claim of fraud based on PMUSA's failure to disclose increased mutagenicity is barred by this court's long-standing rule against imposing additional disclosure requirements beyond those established by statute or agency regulation.

Plaintiffs' claim under the Deceptive Practices Act must also fail. Section 4 of the Deceptive Practices Act exempts from liability "conduct in compliance with the orders" of a federal agency. 815 ILCS 510/4 (West 2000). Because we have concluded that the 1971 and 1995 consent orders provided specific authorization to all industry members to engage in the conduct permitted by the orders, these orders fall within the scope of section 4, even though PMUSA was not a party to either consent order. See also *Mario's Butcher Shop & Food Center, Inc. v. Armour & Co.*, 574 F.Supp. 653, 655 (N.D.Ill.1983) (noting parallel between exemption clauses of the Consumer Fraud Act and the Deceptive Practices Act).

We have resolved the present case entirely on the basis of state law by construing and applying an exemption clause in a state statute. We do not address PMUSA's arguments that this action is expressly or impliedly preempted by federal law. Operation of section 10b(1) is not dependent on the intent of Congress. Rather, it is dependent on the intent of the Illinois General Assembly to allow regulated entities to engage in commercial conduct that might otherwise be alleged to be fraudulent or deceptive without risk of civil liability, so long as that content is specifically authorized by the regulatory body.

Finally, we share the concerns expressed by plaintiffs and their *amici* about the devastating health effects of

smoking and, in particular, the scourge of smoking among young people. We emphasize that because this action is barred by section 10b(1) of the Consumer Fraud Act, it is unnecessary to reach the merits of plaintiffs' claim that PMUSA intentionally deceived the public. Our resolution of the present case is in no way an expression of approval of PMUSA's alleged conduct. Nevertheless, as justices, our role is to apply the law as it exists, not to decide how the law might be improved. We must defer to the policy of the legislature as expressed in the language of the Consumer Fraud Act. Therefore, plaintiffs and others who would seek to alter the conduct of tobacco companies must take their case to the General Assembly, where they might seek amendment of section 10b(1); to the FTC, where they might seek changes in regulations; or to Congress, where they might seek amendments to the Labeling Act.

We reverse the judgment of the circuit court and remand with instructions to dismiss pursuant to section 10b(1) of the Consumer Fraud Act.

Circuit court judgment reversed; cause remanded with instructions.

Chief Justice THOMAS took no part in the consideration or decision of this case.

Justice KARMEIER, specially concurring:

I agree that the judgment of the circuit court should be reversed. In my view, however, that conclusion is not dependent on the applicability of section 10b(1) of the Consumer Fraud Act (815 ILCS 505/10b(1) (West 2000)). Plaintiffs' consumer fraud claim is fatally infirm for an additional and more basic reason: plaintiffs failed to establish that they sustained actual damages.

In *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill.2d 100, 195, 296 Ill.Dec. 448, 835 N.E.2d 801 (2005), this court recently reiterated the well-settled principle that in order to maintain a private cause of action under the Consumer Fraud Act, a plaintiff must prove

that he or she suffered actual damages as a result of a violation of the Act.[1] Actual damages are thus an element of a private right of action under the statute. See 815 ILCS 505/10a (West 2000); *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134, 140, 267 Ill.Dec. 14, 776 N.E.2d 151 (2002). If a plaintiff cannot establish that the defendant's conduct caused him or her to suffer actual damages, no recovery under the Act will lie. See *Avery*, 216 Ill.2d at 196-200, 296 Ill.Dec. 448, 835 N.E.2d 801.

The requirement of actual damages means that the plaintiff must have been harmed in a concrete, ascertainable way. That is, the defendant's deception must have affected the plaintiff in way that made him or her tangibly worse off. Theoretical harm is insufficient. Damages may not be predicated on mere speculation, hypothesis, conjecture or whim. See *Petty v. Chrysler Corp.*, 343 Ill.App.3d 815, 823, 278 Ill.Dec. 714, 799 N.E.2d 432 (2003).

The record in the case before us shows that PMUSA developed and marketed Marlboro Lights and Cambridge Lights cigarettes in response to heightened public concern over health risks posed by smoking. The company believed that it could forestall declining sales by offering a product which consumers perceived as better for them than conventional "full-flavored" brands. Pursuant to that strategy, PMUSA advertised Marlboro Lights and Cambridge Lights cigarettes in a way that led consumers to believe that the brands posed a lower health risk than

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[1] Courts have been criticized for erroneously using the terms "damage" and "damages" interchangeably when these should actually be considered distinct concepts, damage being the loss or hurt that results from injury and damages being the amount awarded to compensate for damage. J. Fischer, Understanding Remedies § 161(c), at 506 (1999). Without passing on the merits of this criticism, I note that there is no such confusion here. The need to prove damages and not merely damage is based not on a judicial gloss, but on the express language of section 10a of the Consumer Fraud Act, which authorizes consumers to bring an "action for *damages*" and recover "actual economic *damages*." 815 ILCS 505/10a (West 2000). (Emphasis added.)

their "full flavored" counterparts. In reality, and as PMUSA was fully aware, the so-called "light" cigarettes not only offered no health benefits, but were actually more toxic.

When a consumer chooses one product over another in the belief that it will be less harmful to his or her health, only to discover later that it may have been more harmful, the existence of damages might seem self-evident. In this case, however, plaintiffs are not seeking damages based on any heightened adverse effects on their health. Personal injury is not at issue. The losses for which plaintiffs seek compensation are purely economic. Their claim is simply that they did not receive what they bargained for. They paid for health benefits they did not get.

The benefit-of-the-bargain rule invoked by plaintiffs governs common law fraudulent misrepresentation cases. *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill.2d 179, 196, 131 Ill.Dec. 155, 538 N.E.2d 530 (1989). Although plaintiffs' cause of action is statutory in nature, the parties agree that the benefit-of-the-bargain rule provides the appropriate standard for ascertaining plaintiffs' right to damages in this case. Under the rule, damages are determined by looking at the loss to the plaintiff rather than the gain to the defendant. The rule is based on the rationale that the defrauded party is entitled to be placed in the same financial position he would have occupied had the misrepresentations in fact been true. See *Martin v. Allstate Insurance Co.*, 92 Ill.App.3d 829, 835, 48 Ill.Dec. 316, 416 N.E.2d 347 (1981). Consistent with this rationale, the measure of damages

> "is such an amount as will compensate the plaintiff for the loss occasioned by the fraud, or, as it has been expressed, the amount which the plaintiff is actually out of pocket by reason of the transaction * * *." 19A Ill. L. & Prac., *Fraud* § 61 (1991).

When this case ultimately proceeded to trial, two individuals were identified as representing the plaintiff class, Sharon Price and Michael Fruth. Both named plaintiffs

testified that they switched to light cigarettes because they believed such cigarettes to be lower in tar and nicotine and therefore healthier. Price also stated that she valued the health component of light cigarettes, or what she thought was the health component of lights. Significantly, however, Price also admitted that she continued smoking PMUSA's light cigarettes even after this litigation alerted her to the fact that the cigarettes were not, in fact, any healthier and may actually be more harmful than the regular version of those cigarettes. News that PMUSA's low tar and light representations were illusory likewise did not deter Fruth from continuing to smoke, although he testified that he did switch back from lights to regulars.

Whatever valuation the class representatives may have placed on the health component of light cigarettes, that valuation had no observable economic consequences. Neither Price nor Fruth offered any testimony suggesting that switching from regulars to lights resulted in their paying any more for cigarettes than they would have otherwise. There was no price disparity between light cigarettes and their full-flavored counterparts, and there is no indication that the switch from regulars to lights caused them to buy more packages of cigarettes. The price they paid did not go up. The quantity they purchased did not increase. No additional ancillary or incidental costs were identified. Moreover, neither Price nor Fruth complained that the cigarettes were not worth what they paid for them. To the contrary, Price's continued purchase of lights even after being alerted to their lack of health benefits suggests that she was entirely satisfied with the value of what she received for her cigarette-purchasing dollar.

Under these circumstances, Price and Fruth cannot be said to have sustained any actual damages as a result of the misrepresentations made by PMUSA. Because they did not show any actual damages, Price and Fruth failed to prove a private right of action under the Consumer Fraud Act. Under *Avery v. State Farm Mutual Automo-*

bile Ins. Co., that is fatal not only to their own cause of action, but to the entire class action. As we held in *Avery*, when a class representative has not proven his claim for consumer fraud, the consumer fraud claim asserted on behalf of the class cannot stand either. The consumer fraud judgment in favor of the class must be reversed. *Avery*, 216 Ill.2d at 204, 296 Ill.Dec. 448, 835 N.E.2d 801. There is no basis for reaching a contrary result here. Accordingly, regardless of the applicability of section 10b(1) of the Consumer Fraud Act (815 ILCS 505/10b(1) (West 2000)), the judgment in favor of plaintiffs must be set aside.

At trial, counsel for plaintiffs did not attempt to compensate for the absence of actual damages to the class representatives by relying on testimony from other members of the class, for the smoking experiences of the other class members were similar to those of Price and Fruth and therefore similarly unhelpful. Instead, class counsel presented the results of an internet survey they had commissioned. Plaintiffs have not cited, and I am not aware of, any authority that would permit the opinions of internet survey respondents to establish actual damages under the Consumer Fraud Act where, as here, the class representatives have not been shown to share the survey respondents' views and have not themselves been harmed in the way those who answered the survey claimed they would be under the hypotheticals presented to them.

Even if I could look past these problems, plaintiffs' damages model is insufficient as a matter of law to support the circuit court's judgment. Plaintiffs contend that their damages under the benefit-of-the-bargain rule, as applied to the facts of this case, are equal to the difference between the value the cigarettes would have had if they possessed the qualities they were represented to have and their value as actually sold. See *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill.2d 179, 196, 131 Ill.Dec. 155, 538 N.E.2d 530 (1989). Because defendant's misrepresentations as to the properties of their cigarettes were

believed to be true, ascertaining the market value of cigarettes possessing the qualities defendants claimed its lights to possess is straightforward. It is the price PMUSA actually charged and the amount plaintiffs actually paid for those cigarettes.

The problem in plaintiffs' analysis arises from the second value, *i.e.*, the value of the cigarettes as actually sold. To compute that value, which is equivalent to the price the cigarettes would have commanded in the marketplace had they not possessed the health attributes suggested by PMUSA's misrepresentations, plaintiffs did not look to the marketplace or actual consumer behavior. Instead, they relied on the Internet survey mentioned earlier, which was commissioned by class counsel. Based on the results of that survey, which sampled fewer than 300 respondents, plaintiffs' expert, Dr. Jeffrey Harris, postulated that the price of lights would have to be discounted by 77.7% before consumers would still be willing to buy them, assuming the cigarettes were the same healthwise as their full-flavored counterparts. When the hypothetical was changed to assume that lights might be more harmful than regular cigarettes, Harris' analysis determined that the amount of the discount would have to be increased to 92.3%. Based on these figures, plaintiffs argued that difference between the hypothetically discounted prices and the prices consumers actually paid showed that consumers had significantly overpaid for PMUSA's light cigarettes in the false hope that those cigarettes would be healthier for them. In plaintiffs' view, the difference was equivalent to the value of the perceived health benefit of the lights, and the overpayment was the measure of plaintiffs' damages.

Professors Robert Solow and George Akerlof, both recipients of the Bank of Sweden Prize in Economic Sciences in Memory of Alfred Nobel, submitted a brief as *amici curiae* attesting that the benefit-of-the-bargain rule expressed by our court in *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill.2d at 196, 131 Ill.Dec. 155, 538

N.E.2d 530, comports with accepted principles of economics. Although they made general statements in support of the basic theoretical and methodological approach taken by Harris, Solow and Akerlof also noted that the "the actual measurement of damages under the applicable legal standard is intrinsically difficult to implement under the facts and circumstances of this case" and that, under those facts and circumstances, "there may be more than one way to measure damages." One senses from these remarks, and from *amici*'s lack of elaboration in evaluating plaintiffs' approach, a certain unease with plaintiffs' damages calculations. It is no wonder.

Putting aside any questions regarding the scientific validity of the survey on which Harris relied, there is a fundamental flaw in his approach. To understand why, one must first recall the purpose of the benefit-of-the-bargain rule, which is to compensate the plaintiff for the pecuniary loss occasioned by the defendant's fraud, that is, for "the amount which the plaintiff is actually out of pocket by reason of the transaction. 19A Ill. L. & Prac. *Fraud* § 61 (1991). If a plaintiff cannot prove that he was any worse off financially as a result of the defendant's deceit, his personal feelings of disappointment or dissatisfaction with the transaction are of no consequence. Financial loss is not measured by subjective feelings. It is determined by the choices and values actually available to a consumer in the marketplace. See, *e.g.*, Restatement (Second) of Torts § 549, Comment *c*, at 110-12 (1977) (for purposes of measuring damages in action for fraudulent misrepresentation, value is normally determined by the price for which an item could be resold in an open market or by private sale if its quality or other characteristics that affect its value were known).

The need for objective, market-based standards to prove financial loss is not being raised here for the first time. It was recognized by defendant's damages expert and is fatal to the plaintiffs' damages model. While the Internet survey commissioned for this case may have shown that sur-

vey respondents would have placed a lower subjective value on cigarettes that lacked the health qualities claimed by PMUSA in its marketing of Marlboro Lights and Cambridge Lights, the marketplace demonstrated that, in reality, consumers would not have paid less to satisfy their tobacco habits had the lights' true properties been known. They would not have stopped smoking, for they were addicted, and they could not have bought cigarettes that cost 77.7% less or 92.3% less, for no such cigarettes existed. At most, they would have reverted back to "full-flavored" versions of the cigarettes.[2]

Significantly, and as I have already observed, the price charged by PMUSA for such cigarettes, and the price consumers were willing to pay despite the absence of claimed health benefits, was precisely the same as the price charged for "lights." In marked contrast to the situation with many products aimed at health consciousness, there was no cost differential for consumers between the "healthy" and "regular" versions of the product. Accordingly, while PMUSA's misrepresentations may have deceived consumers into altering their purchasing decisions, the net change in consumers' economic position as a result of those misrepresentations was zero. In other words, plaintiffs may not have received the benefit of their bargain, but the bargain (*i.e.*, obtaining what were thought to be healthier cigarettes than they would otherwise have purchased) cost them nothing extra. In terms of pecuniary harm, plaintiffs were unaffected. Their financial status remained the same.

This conclusion is not altered by the fact that PMUSA's light cigarettes were more toxic than the full-flavored versions. The additional toxicity unquestionably had adverse

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[2] The "full-flavored" versions manufactured by PMUSA used the very same tobacco as the light brands. The only difference between the cigarettes was the filters. Ironically, to the extent that the light brands were more toxic, the filters were to blame. The filters had the additional effect of impairing the light brands' flavor. The only reason lights were chosen over their full-flavored versions was their perceived health benefits.

effects on plaintiffs' health. It bears repeating, however, that health effects are not part of plaintiffs' damages claim. They are not seeking compensation for personal injury, only pecuniary loss based on their switch to lights in reliance on PMUSA's misrepresentations. For purposes of calculating pecuniary loss, the increased toxicity of lights would be relevant only if one could show (1) that an alternative cigarette with equally high toxicity levels was available on the market at lower cost than the price charged for lights and (2) that consumers would have switched to that ~~lower cost~~ alternative had the truth about lights been known.

The notion that cigarette manufacturers could successfully market a cigarette known to be more toxic than regulars is inconsistent with the realties of consumer demand for more healthful products that led to the development of light cigarettes. It is therefore unsurprising that there is no evidence that a cheaper but more toxic brand of cigarette is actually available for purchase. Given the nature of the class bringing this suit, that is, smokers interested in a product less harmful to their health, it is also highly unlikely that any of them would change to a different brand that was more harmful than regulars, even at a reduced price. The testimony of the class representatives certainly does not suggest they would, and plaintiffs' Internet survey does not speak to the issue.

The Internet respondents were not queried about it. The Internet survey looked to hypothetical conduct assuming that a truly healthier version existed. It did not measure or purport to measure how consumers would actually behave if, as is really the case, there is no truly healthier version.

Having sustained no pecuniary harm, plaintiffs lack the actual economic damages necessary to sustain their cause of action under the Consumer Fraud Act. When the same situation confronted the representative for the putative Illinois class in *Avery*, we concluded that the deficiency

was fatal to his consumer fraud claim (*Avery*, 216 Ill.2d at 199, 296 Ill.Dec. 448, 835 N.E.2d 801) and reversed the judgment for plaintiffs outright. We should not hesitate to reach the same conclusion here.

Here, as in *Avery*, there is no need to remand for a new trial on the damages question. This case does not present a situation in which erroneous rulings by the trial court hampered plaintiffs' ability to fully present their evidence or theory of recovery. The record is complete, and plaintiffs were given wide latitude in developing their damages claim. Further proceedings would serve no purpose. Plaintiffs' claim fails as a matter of law. Because they sustained no actual economic damages, no judgment in their favor under the Consumer Fraud Act could ever stand.

Plaintiffs' consumer fraud claim cannot be revived on the theory that they might be entitled to an award of nominal damages notwithstanding their inability to show actual damages. Nominal damages can only be awarded where a plaintiff prevails in a case. As already discussed, however, a plaintiff cannot sustain a private right of action under the Consumer Fraud Act unless he or she has sustained actual damages. Unless all of the elements of the cause of action, including the element of actual damages, are established, nominal damages cannot be recovered. See *Tolve v. Ogden Chrysler Plymouth, Inc.*, 324 Ill.App.3d 485, 491-92, 258 Ill.Dec. 153, 755 N.E.2d 536 (2001). The lack of actual damages would therefore preclude plaintiffs from recovering nominal damages even if the case were remanded.[3]

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[3] Because actual damages must be shown to prevail in a private right of action for damages under the Consumer Fraud Act, nominals actually serve no purpose in such cases. If a plaintiff shows actual damages, he or she will receive real compensation. When compensation is awarded, there is no need for the largely symbolic function served by nominals. That is no doubt why plaintiffs did not request nominals in their complaint and were not awarded nominals by the circuit court.

Similarly, plaintiffs cannot sidestep the lack of actual damages on the grounds that they are nevertheless entitled to an award of punitive damages. Illinois law does not permit an award of punitive damages in the absence of compensatory damages. See *Lowe v. Norfolk & Western Ry. Co.*, 96 Ill.App.3d 637, 648, 52 Ill.Dec. 108, 421 N.E.2d 971 (1981). The Consumer Fraud Act is no exception. Punitive damages are in addition to compensatory damages and cannot be allowed unless actual damage is shown. See *In re Application of Busse*, 124 Ill.App.3d 433, 438, 79 Ill.Dec. 747, 464 N.E.2d 651 (1984). Because plaintiffs sustained no actual damages here, their claim for punitive damages must therefore fail as well. See *Florsheim v. Travelers Indemnity Co. of Illinois*, 75 Ill.App.3d 298, 310, 30 Ill.Dec. 876, 393 N.E.2d 1223 (1979).

For the foregoing reasons, I fully concur in the result reached by the majority. Plaintiffs cannot recover under the Consumer Fraud Act, and the circuit court's judgment awarding them damages under the Act cannot stand. In reaching this conclusion, I hasten to add, as the majority opinion did, that rejection of plaintiffs' cause of action should in no way be construed as an endorsement of PMUSA's conduct. Our reversal of the circuit court's judgment is not an exoneration of PMUSA. It is merely a conclusion that this particular cause of action by this particular group of claimants seeking this particular form of recovery cannot be sustained under the law of Illinois.

Justice FITZGERALD joins in this special concurrence.

Justice FREEMAN, dissenting:

This is a consumer fraud class action brought under the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 1998)) and the Uniform Deceptive Trade Practices Act (Deceptive Practices Act) (815 ILCS 510/1 *et seq.* (West 1998)). The circuit court found Philip Morris USA (PMUSA) liable for consumer fraud for using the materially false and deceptive terms "lights" and "lower tar and

nicotine" in marketing its Marlboro Lights and Cambridge Lights cigarettes. This court reverses the judgment on the basis that the action is barred by section 10b(1) of the Consumer Fraud Act, which exempts conduct "specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." The court holds that the Federal Trade Commission (FTC), through the use of two "consent orders," specifically authorized all American tobacco companies to use descriptive terms such as "lights," or "lowered tar and nicotine" in marketing and promoting cigarettes. 219 Ill.2d at 265-66, 302 Ill.Dec. at 50, 848 N.E.2d at 50. Therefore, PMUSA was exempt from civil liability for the use of those terms under section 10b(1) of the Consumer Fraud Act and section 4 of the Deceptive Practices Act. 219 Ill.2d at 273, 302 Ill.Dec. at 54, 848 N.E.2d at 54.

The court's action today is predicated upon an erroneous and irresponsible interpretation of our Consumer Fraud Act, an act which I note is to be interpreted so as to give full protection to the citizens of this state against the fraudulent conduct of others. The protection of consumers from unfair practices is, of course, a traditional state police power function. The court's construction of section 10b(1) serves not only to dilute needlessly the force of our state consumer protection legislation, but to limit unnecessarily our state's citizens' consumer protection in this area to a federal agency. For these reasons and because I do not agree that PMUSA was exempt from liability under section 10b(1), I cannot join in the court's opinion. Rather, I would hold that the FTC did not specifically authorize PMUSA, within the meaning of section 10b(1) of the Consumer Fraud Act, to use the disputed descriptors. I therefore respectfully dissent.

I. Background

Plaintiffs filed their initial complaint on February 10, 2000. In it, they alleged violations of the Consumer Fraud Act and claims of unjust enrichment against PMUSA on behalf of a purported class of Illinois residents

who had purchased "Light" cigarettes in Illinois since the introduction of Marlboro Lights in 1971. Plaintiffs claimed that the word "lights" and the phrase "lowered tar and nicotine" were deceptive in that those words led each consumer to believe that he or she would receive lower tar and nicotine from these cigarettes, and that, as a result, smoking them would be less hazardous than smoking regular, full-flavored cigarettes. Plaintiffs alleged that all class members purchased Lights because of a belief that they were less hazardous, and provided health benefits not associated with regular, full-flavored cigarettes, and that no one would have purchased Lights "but for" PMUSA's "unfair and/or deceptive acts and/or practices." Plaintiffs sought damages solely for economic loss. Plaintiffs moved for class certification on September 8, 2000. PMUSA opposed the motion, arguing that the plaintiffs failed to satisfy the requirements of the Illinois class action statute, because, *inter alia*, individual questions of fact predominated over any common issues shared by the purported class members. The circuit court certified the class on February 8, 2001.

Following class certification, PMUSA moved for summary judgment. PMUSA argued that Congress, in enacting the Federal Cigarette Labeling and Advertising Act (Labeling Act) (15 U.S.C. § 1331 *et seq.* (2000)), had specified the warnings that cigarette manufacturers must give to consumers and had expressly prohibited states from requiring additional disclosures. PMUSA also argued that the FTC had adopted the FTC test method to measure tar and nicotine yields and had allowed and encouraged manufacturers to use descriptive terms such as "lowered tar and nicotine" and "lights" so long as those terms were consistent with the FTC method. Any inconsistent state-law duty, PMUSA contended, would conflict with the FTC's policies regarding tar and nicotine disclosures. For this reason, PMUSA asserted that its conduct as alleged by the plaintiffs was exempt from the Consumer Fraud Act by virtue of section 10(b). Both parties thereafter submitted affidavits of experts on this issue.

Plaintiffs' expert averred that the FTC did not have an official policy which permitted cigarette companies to use these terms. Plaintiffs further maintained that the FTC had not had occasion to ever consider the terms at issue, "lowered tar and nicotine" and "lights" as those descriptors were used by PMUSA in this case, Finding that there were "significant disputes about several material facts which can only be decided at trial," the circuit court "reserved judgment" on the matter until trial.

At trial, as it was during the pretrial proceedings, it was PMUSA's position, established through testimony and exhibits, that its use of the terms "lights" and "lowered tar and nicotine" were in compliance with FTC policies. Dr. John Peterman testified as an expert on behalf of PMUSA with respect to the FTC's relationship to cigarette advertising. The FTC in 1955 established "Cigarette Manufacturing Guides," which set forth the FTC's policies on the disclosure of tar and nicotine yields in cigarettes. The Guidelines permitted a manufacturer to make claims regarding tar and nicotine yields only if the manufacturer could substantiate the claims "by competent and scientific proof." In the late 1950s, scientists began to discern a relationship between exposure to cigarette tar and tumors in laboratory animals. Cigarette manufacturers responded by testing the amount of tar produced by their cigarettes and advertising the results. Each manufacturer used different machines to measure the tar, and confusion ensued. According to Dr. Peterman, in response to the multiple testing systems being used, the FTC developed a uniform testing system for use throughout the country. Tar and nicotine measures could be advertised provided that they were measured according to the FTC's testing method. Under this testing methodology, a low tar cigarette is a cigarette which had a tar level of 15 milligrams or less. However, the FTC did not enact or adopt any trade regulation rule with respect to cigarette advertising. Indeed, the parties do not dispute the fact that there is not any industrywide formal rulemaking authorizing the use of the disputed descriptors at issue in this

case, "lights" and "lowered in tar and nicotine." Nor do they dispute the fact that the FTC does not have any industrywide formal rule which authorizes or requires cigarette manufacturers to use the terms "light" or "low tar" or any variation thereof. Moreover, it is undisputed that the FTC views what it considers to be a "regulatory" scheme in this area as a "voluntary approach." See 219 Ill.2d at 192, 302 Ill.Dec. at 10, 848 N.E.2d at 10.

Defendant's expert, Dr. Peterman, testified that the primary mission of the FTC is to enforce a variety of federal antitrust and consumer protection laws. The FTC is primarily a law enforcement agency, conferred with both investigative and enforcement powers. However, to the best of Dr. Peterman's knowledge, there was no bureau, section, or other subset of the FTC dedicated to, or even associated with, tobacco regulation. The two primary tools the FTC employs to enforce consumer protection laws are trade regulation rules and enforcement procedures. Trade regulation rules are promulgated though formal notice and comment rulemaking. FTC policy is adopted or approved by the FTC commissioners acting collectively as the commission. Dr. Peterman admitted that an individual FTC commissioner giving a speech discussing FTC policy is not, *per se*, FTC policy. An FTC staff member cannot create FTC policy.

Dr. Peterman, defendant's expert, testified that there has never been an FTC trade regulation rule governing cigarette advertising that has been put into effect. In 1964, the FTC formally promulgated a trade regulation rule declaring it an unfair and deceptive practice within the meaning of the FTC Act to fail to prominently disclose, in all cigarette advertising and packaging, that cigarette smoking is dangerous and may cause death from cancer or other diseases. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed.Reg. 8324, 8325 (1964). However, in 1965, Congress enacted the federal Labeling Act. This Act, *inter alia*, vacated the newly promulgated FTC

cigarette health warning trade regulation rule. No FTC regulation, document, or official statement has ever regulated "low tar" and "lights" descriptors. Further, the FTC has disavowed any "official" definition of these terms as well as the term involved in this case, "lowered tar and nicotine." Rather, a cigarette company's decision to use descriptors such as "light," or "low tar," is voluntary; there is no FTC rule requiring or governing their use. A cigarette company could stop using those descriptors, and there is no FTC policy that would prohibit it.

Dr. Peterman did not offer an expert opinion that the FTC has a policy that prohibits states from regulating the term "lights" on cigarettes. Nor did he offer an expert opinion that the FTC has granted cigarette companies the right to use the "lights" and "low tar" descriptors and, thereby, immunize them from state regulation of those descriptors.

In 1970, the FTC proposed a formal trade regulation rule that would have required cigarette companies to disclose in their advertising FTC-measured tar and nicotine content of their cigarettes. See 35 Fed.Reg. 12,671 (proposed August 8, 1970). However, the FTC dropped this proposed order after eight cigarette companies entered into a voluntary trade agreement. Those signatories voluntarily agreed to provide the information on their cigarette packages. See 36 Fed.Reg. 784 (1971). The 1970 voluntary trade agreement was not all-inclusive; not every cigarette company signed the agreement. Those companies that did not sign the agreement have not included tar and nicotine rates in their cigarette advertising. Up to the time of trial, the FTC has taken no enforcement action against those companies.

In 1971, the FTC and a cigarette company, American Brands, Inc., reached an agreement that was memorialized in a consent order. In the 1971 consent order, the FTC charged that American Brands' advertisements of its cigarettes designated as "Pall Mall Gold" 100s, "Pall Mall Menthol" 100s and "Lucky Filters" was imprecise and

misleading because the cigarettes were being described as "lower than the best selling filter king." In actual fact, however, the FTC found that these brands were higher in tar levels than many other brands. The FTC and American Brands agreed that American Brands' advertisements which stated that its cigarettes were low in tar must contain the tar and nicotine yield results as measured under the FTC testing methods (the advertisements challenged by the FTC in this action did not contain any tar and nicotine yield results). If American Brands' advertisements contained a comparison to another product, then the advertisement had to include the tar and nicotine yield of that product as well. *In re American Brands, Inc.*, 79 F.T.C. 255 (1971).

During the direct examination of defendant's expert witness, Dr. Peterman, he stated that the 1971 consent order against American Brands, Inc., was "an official act of the FTC." Further, the order provided "industry guidance to [PMUSA] and others regarding the use of descriptors." This "guidance" was found in the terms of the order against American Brands. According to Dr. Peterman, nonparties to a consent order, even an entire industry, learn from the order how far it can and cannot go. According to Peterman, the 1971 consent order was exemplary of the FTC intending to provide industrywide guidance with respect to issues addressed in consent orders.

However, on cross-examination, Dr. Peterman qualified his direct examination testimony by admitting that the 1971 consent order did not mention the descriptor "lights." Also, the consent order did not define the descriptor "low tar," or establish a numerical standard for that term. This form of "compliance" is a voluntary decision on the part of each cigarette company. It is not a trade regulation rule. Further, PMUSA was never a party to the proceeding and never signed the consent order. Each cigarette company, including PMUSA, and the entire industry collectively, could simply stop using the disputed descriptors if they so chose. Peterman further

acknowledged that the FTC has never taken any enforcement action against a cigarette manufacturer of these so-called "light" brands because that manufacturer did not use the word "light" in the brand name. There is no evidence in the record that PMUSA ever complied with this consent order.

In 1995, the FTC and another cigarette company, American Tobacco Company, reached an agreement that was memorialized in a consent order. In the 1995 consent order, the FTC and American Tobacco agreed that "presentation of the tar and/or nicotine ratings of any of respondent's brands of cigarettes and the tar and/or nicotine ratings of any other brand (with or without an express or implied representation that respondent's brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine) shall not be deemed" to violate an existing ban on numerical comparisons. *In re American Tobacco Co.*, 119 F.T.C. 3 (1995). Dr. Peterman testified that the FTC intended to provide industrywide guidance with respect to issues addressed in the 1995 consent order against American Tobacco Company.

At the conclusion of the trial, the circuit court denied PMUSA's affirmative defense based upon section 10b(1) of the Consumer Fraud Act. The court specifically found Dr. Peterman's testimony to be "unpersuasive" on PMUSA's claim that the issues in this case could potential cause a conflict between state and federal law. Moreover, the court found that Dr. Peterman did not have any "expertise in assessing FTC involvement in regulation of the issues" and that the plaintiffs' claims in this case did not conflict in any way with the federal Labeling Act or the regulations and policies of the FTC. With respect to the FTC, the court ruled:

> "The false and misleading use of the descriptors 'Lights' and 'Lowered Tar and Nicotine' has never been specifically authorized by law. Philip Morris voluntarily chose to use these terms on its packages of Marlboro Lights and Cambridge Lights. No regu-

> latory body has ever required (or even specifically approved) the use of these terms by Philip Morris. The court finds that Philip Morris has not established that its conduct is 'specifically authorized' by law."

The circuit court further found plaintiffs had proven that PMUSA violated the Consumer Fraud Act through the deceptive act of misrepresenting its Cambridge Lights and Marlboro Lights products as "lights" and misrepresenting Marlboro Lights as "Lowered in Tar and Nicotine."

II. Section 10b(1) of the Consumer Fraud Act

Section 10b(1) of the Consumer Fraud Act exempts conduct "specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." 815 ILCS 505/10b(1) (West 1998). PMUSA contends that the FTC's policies regarding cigarette advertising falls within the scope of the phrase "specifically authorized by laws administered by an regulatory body or officer acting under statutory authority of this State or the United States." Because PMUSA asserted section 10b(1) as an affirmative defense, PMUSA has the burden of proving it. See *Pascal P. Paddock, Inc. v. Glennon*, 32 Ill.2d 51, 54, 203 N.E.2d 421 (1964) (observing "elementary" rule that party asserting affirmative defense has the burden of proving it); *In re Marriage of Jorczak*, 315 Ill.App.3d 954, 957, 248 Ill.Dec. 862, 735 N.E.2d 182 (2000) (same).

After reviewing the plain language of the statute, this court's case law concerning section 10b(1), and the facts in this case, I am unable to conclude, as the court today does, that section 10b(1) exempts Philip Morris from suit. I believe that a fair reading of the statute compels the conclusion that the policies of the FTC, as presented at trial, do not rise to the level of specific authorization contemplated by our legislature when it enacted the statute.

My colleagues correctly point out that the primary rule of statutory construction is to ascertain and give effect to

the intent of the legislature; that the best indicator of legislative intent is the statutory language; that a court gives undefined words their plain and ordinary meaning; and that it is appropriate to use a dictionary to ascertain the meaning of undefined terms. 219 Ill.2d at 242-43, 302 Ill.Dec. at 37-38, 848 N.E.2d at 37-38. I note, however, that the court ignores several other principles of statutory construction. For example, the court does not mention that, in examining a statute's plain language, "'[t]he statute should be evaluated as a whole, with each provision construed in connection with every other section.'" *Eden Retirement Center, Inc. v. Department of Revenue*, 213 Ill.2d 273, 291, 290 Ill.Dec. 189, 821 N.E.2d 240 (2004), quoting *Paris v. Feder*, 179 Ill.2d 173, 177, 227 Ill.Dec. 800, 688 N.E.2d 137 (1997); accord *In re Detention of Lieberman*, 201 Ill.2d 300, 308, 267 Ill.Dec. 81, 776 N.E.2d 218 (2002) (recognizing that "words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute"); *Huckaba v. Cox*, 14 Ill.2d 126, 131, 150 N.E.2d 832 (1958); 2A N. Singer, Sutherland on Statutory Construction § 46:05 (6th ed.2000); 73 Am.Jur.2d *Statutes* § 165 (2001). Nor does the court acknowledge the fundamental canon of statutory construction which provides that "in determining the intent of the legislature, the court may properly consider not only the language of the statute, but also the reason and necessity for the law, the evils sought to be remedied, and the purpose to be achieved." *Lieberman*, 201 Ill.2d at 308, 267 Ill.Dec. 81, 776 N.E.2d 218.

Section 11a of the Consumer Fraud Act mandates: "This Act shall be liberally construed to effect the purposes thereof." 815 ILCS 505/11a (West 1998). By virtue, then, of its plain language, courts are mandated to give the Act a liberal construction: "This section provides a clear mandate to Illinois courts to utilize the Act to the greatest extent possible to eliminate all forms of deceptive or unfair business practices and provide appropriate relief to consumers." *Totz v. Continental Du Page Acura*, 236 Ill.App.3d 891, 901, 177 Ill.Dec. 202, 602 N.E.2d 1374

(1992); accord *American Buyers Club of Mt. Vernon, Illinois, Inc. v. Honecker*, 46 Ill.App.3d 252, 257, 5 Ill.Dec. 666, 361 N.E.2d 1370 (1977) (expressly referring to statute). Thus, in construing the exemption provided in section 10b(1) of the Act, it is not merely proper for this court to consider, *inter alia*, the evils sought to be remedied and the purpose to be achieved, but the Act itself affirmatively mandates such consideration. Although the court acknowledges that the Act is to be liberally construed (219 Ill.2d at 244, 302 Ill.Dec. at 38, 848 N.E.2d at 38), its actual interpretation of section 10b(1) is decidedly not a liberal one, as it constricts, rather than expands, the Act's ambit.

What does "liberal construction" mean?

> "Liberal statutory construction signifies an interpretation that produces broader coverage or more inclusive application of statutory concepts. [Citation.] Liberal construction is ordinarily one that makes a statute apply to more things or in more situations than would be the case under strict construction. [Citation.] ""[L]iberal construction' means to give the language the language of a statutory provision, freely and consciously, its commonly, generally accepted meaning, to the end that the most comprehensive application thereof may be accorded, without doing violence to any of its terms." [Citation.]'" *Board of Education of Community Consolidated School District No. 59 v. State Board of Education*, 317 Ill.App.3d 790, 795, 251 Ill.Dec. 347, 740 N.E.2d 428 (2000).

Accord *Smith v. Stevens*, 82 Ill. 554, 556, 1876 WL 10255 (1876) (observing that statute "is emphatically a remedial act, and, in accordance with a well established canon, it must receive a liberal construction, and made to apply to all cases which, by a fair construction of its terms, it can be made to reach"); 3 N. Singer, Sutherland on Statutory Construction § 58:2, at 88 (6th ed.2001); 73 Am.Jur.2d *Statutes* § 179 (2001). Thus, section 11a of the Consumer

Fraud Act actually directs courts to employ judicial construction to supply gaps in the statutory language, in order to afford broader coverage or a more inclusive application. *Bank One Milwaukee v. Sanchez*, 336 Ill.App.3d 319, 321-22, 324, 270 Ill.Dec. 642, 783 N.E.2d 217 (2003); *Hurlbert v. Cottier*, 56 Ill.App.3d 893, 896, 14 Ill.Dec. 538, 372 N.E.2d 734 (1978).

In this case, however, rather than using judicial construction to effectuate expansive coverage of the Consumer Fraud Act, the court employs arduous judicial construction to establish limitations on the reach of the Act. The court breaks down the statutory term "specifically authorized by laws administered by" and, with the aid of a dictionary, separately and in a vacuum defines the word "specific" and the word "authorize." 219 Ill.2d at 243-44, 302 Ill.Dec. at 38-39, 848 N.E.2d at 38-39. Based on this dissection, the court speculates that the legislature "must have intended" the phrase "laws administered by" to require deference to agency policy and practice. 219 Ill.2d at 244, 302 Ill.Dec. at 37-38, 848 N.E.2d at 37-38. I disagree with this interpretation. Courts have long recognized that ascertaining legislative intent is not always properly accomplished by mechanically applying the dictionary definitions of individual words and phrases. See, *e.g.*, *Whelan v. County Officers' Electoral Board*, 256 Ill.App.3d 555, 558, 196 Ill.Dec. 297, 629 N.E.2d 842 (1994). As Judge Learned Hand observed:

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing * * *. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish * * *." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.1945).

The court's tortured construction of section 10b(1) ignores the rule that statutes are to be construed as a whole, and

the fact that expansive construction of the Act comes from the Act itself.

Even more disturbing than the dissection of the statutory language of section 10b(1) is the court's speculation as to the "apparent legislative intent." 219 Ill.2d at 244, 302 Ill.Dec. at 38, 848 N.E.2d at 38. The court states that section 10b(1):

> "serves to channel objections to agency policy and practice into the political process rather than into the courts. [Citations.] Parties who desire to bring about change in agency policies or rules can take their complaints to the agency itself and can participate in the formal rulemaking process. If their concerns are not addressed by the agency, they may seek assistance from their legislators and may use the political process, including the power of the ballot box, if their voices are not heard." 219 Ill.2d at 245, 302 Ill.Dec. at 38, 848 N.E.2d at 38.

This statement is a brazen usurpation of the power of the legislature. Not only does it completely ignore the statutorily mandated expansive construction of the Act, but it injects the court's own preferred public policy into this statutory provision without any basis in law or fact.

Such an expansive reading of section 10b(1) flies in the face of the plain language of the Act read as a whole. First, as I have explained, the plain language of section 11a mandates an expansive construction. 815 ILCS 505/11a (West 1998). Second, the plain language of section 10b(1) exempts conduct "specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." 815 ILCS 505/10b(1) (West 1998). Accepting that this plain language is "the most reliable indicator of the legislature's objectives" in enacting the Consumer Fraud Act (*Michigan Avenue National Bank v. County of Cook*, 191 Ill.2d 493, 504, 247 Ill.Dec. 473, 732 N.E.2d 528 (2000)), it is clear that the legislature would not consider PMUSA's conduct exempt under section 10b(1). The re-

cord simply does not establish that the FTC's regulatory activity constituted "specific authorization" for PMUSA to use the disputed descriptors, *i.e.*, "Lights," and "lowered tar and nicotine," in marketing Marlboro Lights or Cambridge Lights.

Further, section 10b(1) of the Consumer Fraud Act lists *exemptions* from the otherwise expansive and inclusive reach of the Act. Because of this, I believe that the court's expansive reading of section 10b(1), an exception to the Consumer Fraud Act, not only flies in the face of the plain language of the Act mandating an expansive construction, but also ignores another rule of statutory construction: exceptions in a statute, being designed to qualify or limit what is declared in the body of an act, should be strictly construed. *Mid-South Chemical Corp. v. Carpentier*, 14 Ill.2d 514, 519, 153 N.E.2d 72 (1958) (and cases cited therein); see *People v. Chas. Levy Circulating Co.*, 17 Ill.2d 168, 171, 161 N.E.2d 112 (1959); 82 C.J.S. *Statutes* § 371 (1999). "*Where a general rule is established by statute with exceptions, the court ordinarily will not curtail the former or add to the latter by implication.*" (Emphasis added.) 82 C.J.S. *Statutes* § 371, at 496-97 (1999). I note that "[t]hese rules are particularly applicable where, in general, the law itself is entitled to a liberal construction." 73 Am.Jur.2d *Statutes* § 212, at 402 (2001). Courts may give apparently plain words a restrictive meaning if such is understood by the statute as a whole, or by the persuasive gloss of legislative history. *United States v. Witkovich*, 353 U.S. 194, 199, 77 S.Ct. 779, 782, 1 L.Ed.2d 765, 769 (1957); *Whelan*, 256 Ill.App.3d at 558, 196 Ill.Dec. 297, 629 N.E.2d 842; *Fleischer v. Board of Community College District No. 519*, 128 Ill.App.3d 757, 760, 83 Ill.Dec. 914, 471 N.E.2d 213 (1984). The court's disregard for the combination of the statutorily mandated expansive and inclusive construction of the Consumer Fraud Act, and the well-settled rule of statutory construction that exceptions in statutes are to be strictly construed, fatally undercuts the persuasiveness of its statutory construction.

The court holds that "the FTC's informal regulatory activity, including the use of consent orders, comes within the scope of section 10b(1)'s requirement that the specific authorization be made 'by laws administered by' a state or federal regulatory body." 219 Ill.2d at 258, 302 Ill.Dec. at 46, 848 N.E.2d at 46. However, neither the court's lengthy discussion of FTC policy and practice nor the court's citations to our case law establish that the FTC's regulatory activity constituted "specific authorization" for PMUSA to use the disputed descriptors in marketing Marlboro Lights or Cambridge Lights.

The court correctly observes that our past decisions "make it clear that mere compliance with applicable federal regulations is not necessarily a shield against liability under the Consumer Fraud Act." 219 Ill.2d at 247, 302 Ill.Dec. at 40, 848 N.E.2d at 40. My colleagues, in fact, devote several pages of their analysis to discussing some of this court's decisions involving section 10b(1). 219 Ill.2d at 245-53, 302 Ill.Dec. at 39-43, 848 N.E.2d at 39-43 (discussing *Lanier v. Associates Finance, Inc.*, 114 Ill.2d 1, 101 Ill.Dec. 852, 499 N.E.2d 440 (1986), *Martin v. Heinold Commodities, Inc.*, 163 Ill.2d 33, 205 Ill.Dec. 443, 643 N.E.2d 734 (1994), and *Jackson v. South Holland Dodge, Inc.*, 197 Ill.2d 39, 258 Ill.Dec. 79, 755 N.E.2d 462 (2001)). None of these cases, however, support the court's holding in this case.

In *Lanier*, for example, the issue was whether the "specific authorization" requirement of section 10b(1) was found in a Federal Reserve Board staff interpretation of a federal regulation. This court explained as follows:

> "The Truth in Lending Act was enacted by Congress to assure meaningful disclosure of credit terms, so that consumers can readily compare various credit options available to them. [Citation.] Congress granted the Federal Reserve Board the authority to prescribe regulations to carry out the purposes of the Truth in Lending Act. [Citation.] Pursuant to that authority, *the Board enacted a com-*

> *prehensive set of rules, known as Regulation Z* [citation], *implementing the principles of the Truth in Lending Act.*" (Emphasis added.) *Lanier*, 114 Ill.2d at 11, 101 Ill.Dec. 852, 499 N.E.2d 440.

In 1973, the Federal Reserve Board staff issued an "official interpretation" of Regulation Z. *Lanier*, 114 Ill.2d at 12, 101 Ill.Dec. 852, 499 N.E.2d 440. This court further explained:

> "Although not binding upon the courts, the Federal Reserve Board's formal interpretations are entitled to a great degree of deference. This deference is especially appropriate in interpreting the Truth in Lending Act and the Board's own Regulation Z. [Citation.] The Supreme Court has stated that '[u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or regulation [Z] should be dispositive.' [Citations.]" *Lanier*, 114 Ill.2d at 13, 101 Ill.Dec. 852, 499 N.E.2d 440.

The *Lanier* court explained as follows. The Federal Reserve Board is the agency that Congress empowered to prescribe implementing and interpretive regulations for the Truth in Lending Act. Therefore, the Board is entitled to the greatest respect in the interpretation of its own regulations. Further, it is unimportant that "formal interpretations" are issued by Federal Reserve Board staff rather than the Board itself, because judicial deference is based on agency expertise. Moreover:

> "Congress included compliance with official staff interpretations when it absolved creditors from liability under the Truth in Lending Act for 'any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations.' (15 U.S.C. sec. 1640(f) (1980).) Section 1640 evinces a clear congressional determination to treat the Board's administrative interpreta-

> tions under the Truth in Lending Act as authoritative." *Lanier*, 114 Ill.2d at 13-14, 101 Ill.Dec. 852, 499 N.E.2d 440.

The *Lanier* court concluded that the disclosure required by the Board's staff interpretation of Regulation Z implicitly provided "specific authorization" not to make any additional disclosures. *Lanier*, 114 Ill.2d at 17-18, 101 Ill.Dec. 852, 499 N.E.2d 440.[4]

The clarity and strength of the agency regulation in *Lanier* stands in marked contrast to the implicit and uncertain methodology of the FTC in this case. *Lanier* involved a formal staff interpretation of an agency's formally promulgated regulation. Indeed, the enabling legislation recognizes such a staff interpretation. In this case, the FTC has never promulgated any industrywide formal rule that regulates the use of the disputed descriptors. There is no formal rule to interpret, either formally or informally. The evidence adduced at trial established that, rather than employ even informal rulemaking, the FTC took a "voluntary approach" to regulating the cigarette industry. Dr. Peterman acknowledged that the FTC, generally, does not adopt trade rules that approve conduct that an FTC-regulated business may choose to engage in. Rather, the FTC adopts regulations that require or forbid specific conduct. Regarding cigarettes, the FTC has never promulgated a single trade regulation governing cigarette advertising that has ever been in effect. No FTC regulation, document, or official statement has ever regulated "low tar" and "lights" descriptors. Further, the FTC has disavowed any "official" definition of these terms. Rather, a cigarette company's decision to use descriptors such as "light," or "low tar," is voluntary; there is no FTC rule re-

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[4] The court also discusses a subsequent decision of this court, *Jackson v. South Holland Dodge, Inc.*, 197 Ill.2d 39, 258 Ill.Dec. 79, 755 N.E.2d 462 (2001). 219 Ill.2d at 248-49, 302 Ill.Dec. at 40-41, 848 N.E.2d at 40-41. Although the court does not rely on *Jackson* in its holding, I note that *Jackson* involved the same federal disclosure requirement as in *Lanier*. *Jackson*, 197 Ill.2d at 45-47, 258 Ill.Dec. 79, 755 N.E.2d 462.

quiring their use. A cigarette company could stop using those descriptors and there is no FTC policy that would prohibit it. Indeed, Dr. Peterman admitted that if "light" cigarettes delivered the same level of tar and nicotine as "regular" cigarettes, the "light" descriptor would be false and misleading.

In its opinion, the court describes a 1970 FTC proposal that would have declared it an unfair or deceptive practice under the FTC Act for cigarette manufacturers to fail to disclose in their advertising the tar and nicotine content of the product, based on the most recent FTC test results. 219 Ill.2d at 192, 302 Ill.Dec. at 10, 848 N.E.2d at 10. The court notes that this proposal was dropped after eight cigarette companies voluntarily agreed to provide the information on their cigarette packages. 219 Ill.2d at 192, 302 Ill.Dec. at 10, 848 N.E.2d at 10. The court, however, fails to observe that, during his cross-examination, Dr. Peterman recognized that the 1970 trade agreement was not all-inclusive. In other words, not every cigarette company signed the agreement. Further, those companies who did not sign the agreement have not included tar and nicotine rates in their cigarette advertising. Indeed, up to the time of trial, the FTC has taken no enforcement action against those companies.

Unwilling to allow the FTC's lack of definitive regulations in the area of cigarette advertising to control the question of the application of section 10b(1) to this case, the court holds that two consent orders entered into by the FTC and another tobacco producer constitute the type of regulatory activity that falls within the scope of section 10b(1). The majority opinion describes the background to the 1971 consent order against American Brands (219 Ill.2d at 193-97, 302 Ill.Dec. at 10-13, 848 N.E.2d at 10-13) and the 1995 consent order against American Tobacco (219 Ill.2d at 207-08, 302 Ill.Dec. at 18-19, 848 N.E.2d at 18-19).

During his direct examination, Dr. Peterman, defendant's expert, testified that the 1971 FTC consent order

against American Brands, Inc., was "an official act of the FTC." Further, the order provided "industry guidance to [PMUSA] and others regarding the use of descriptors." This "guidance" was found in the terms of the order against American Brands. According to Dr. Peterman, nonparties to a consent order, even an entire industry, learn from the order how far it can and cannot go. According to Peterman, the 1971 consent order was exemplary of the FTC intending to provide industrywide guidance with respect to issues addressed in consent orders.

However, the 1971 consent order did not mention the descriptor "lights." Nor did it concern the disputed descriptor in this case, "lowered tar and nicotine." The consent order did not define the descriptor "low tar," or establish a numerical standard for that term. Peterman testified that this form of "compliance" is a voluntary decision on the part of each cigarette company. It is not a trade regulation rule. Peterman acknowledged that PMUSA was never a party to the proceeding and never signed the consent order. Each cigarette company, including PMUSA, and the entire industry collectively, could simply stop using the disputed descriptors if they so chose. Peterman further acknowledged that the FTC has never taken any enforcement action against a cigarette manufacturer of these so-called "light" brands because that manufacturer did not use the word "light" in the brand name. There is no evidence in the record that PMUSA ever complied with this consent order.

Dr. Peterman also testified that the FTC intended to provide industrywide guidance with respect to issues addressed in the 1994 consent order against American Tobacco Company. However, as with the 1971 consent order, the 1994 consent order did not mention the descriptor "lights." Also, it did not define the descriptor "low tar," or establish a numerical standard for that term. Indeed, the two consent orders upon which PMUSA relies were not directed at it, but at other parties. This is the issue: whether PMUSA's conduct was "specifically authorized"

by the two FTC consent orders directed at other parties: American Brands, Inc., and American Tobacco Company. See 219 Ill.2d at 253-54, 302 Ill.Dec. at 43, 848 N.E.2d at 43. I observe that Dr. Peterman did *not* offer an expert opinion that the FTC has granted cigarette companies the right to use "light" or "low tar" descriptors and immunize them from state regulation of those descriptors.

Further proof as to the lack of regulatory action with respect to the disputed descriptors can be found in Dr. Peterman's testimony. The FTC, in 1997, asked for comments as to whether the use of the disputed descriptors "should be changed or in any way are potentially misleading." According to Peterman, "that investigation remained open as of the date of his testimony." 219 Ill.2d at 224, 302 Ill.Dec. at 27, 848 N.E.2d at 27. Given that the record evidence establishes that the FTC's position on the use of the descriptors "remained open," it is difficult to understand how the FTC's activities in this area can be deemed to be "specific authorization" of anything.

In light of the above, I believe the regulatory action present in this case is much less specific than the regulatory action taken by the Federal Reserve Board with respect to Regulation Z in *Lanier*. *Lanier*, therefore, is distinguishable from and, contrary to, not consistent with, the court's conclusion in this case. *Jackson* is likewise distinguishable from the court's holding in this case.

Unlike my colleagues in the majority, I do not believe that the Illinois General Assembly intended that such "implicit" and "uncertain" (see 219 Ill.2d at 255, 302 Ill.Dec. at 44-45, 848 N.E.2d at 44-45) methods of agency action, such as consent orders, directed at other parties, constitute the "specific authorization" required in section 10b(1) to exempt conduct from the broad coverage of the Consumer Fraud Act. I note that the court refers to a 1964 FTC Statement that offers "ten reasons why a formal rulemaking proceeding may be preferable to an adjudicative proceeding, or a series of adjudicative proceedings." 219 Ill.2d at 254, 302 Ill.Dec. at 44, 848 N.E.2d at

44. While not condemning the use of agency adjudicative proceedings to establish agency policy, the court's own quotations clearly evince a FTC preference for formal rulemaking. 219 Ill.2d at 254-56, 302 Ill.Dec. at 44-45, 848 N.E.2d at 44-45. Given the agency's own preference for formal rulemaking, it is not unreasonable for our legislature to have likewise had this understanding of administrative law in mind in enacting section 10b(1) as an exception to the expansive reach of the Act.

Further, while an agency has the discretion to use adjudicatory proceedings to announce a sectorwide substantive principle or standard of conduct, it must be remembered that the consent orders upon which PMUSA relies are not directed at PMUSA. The court reasons:

> "The FTC's *observation* that adjudication *could* be used to announce 'a substantive principle or standard of conduct having general application' *suggests* that a consent order *may* serve as authorization for nonparties to the order to follow its directives." (Emphases added.) 219 Ill.2d at 256, 302 Ill.Dec. at 45, 848 N.E.2d at 45.

This reasoning, by its own terms, is based on mere conjecture and suggestion. The proof to which the court points in support of this conclusion – two FTC reports to Congress (219 Ill.2d at 258, 302 Ill.Dec. at 45-46, 848 N.E.2d at 45-46) – is, in my opinion, insufficient to show that these two consent orders establish sectorwide policy. I view these reports as the FTC describing its efforts to obtain voluntary compliance with the two consent orders. *Negotiations to obtain voluntary compliance from individual parties do not equate with announcing an industry-wide substantive principle or standard of conduct.*

Federal courts share my view of consent orders. An administrative consent order is an agreement reached in an administrative proceeding between parties, one of which is usually the agency's litigation staff. If the agency accepts the agreement, the agency issues an order as a court issues a consent decree. *A.R. ex rel. R.V. v. New*

York City Department of Education, 407 F.3d 65, 77 n.12 (2nd Cir.2005) (and authorities cited therein). While the interpretation of a statute by the agency charged with its administration is accorded deference, a consent order simply memorializes an agreement of the parties to end litigation upon certain terms. An unsubstantiated assertion of a legal proposition in an administrative consent order is untested in the adversarial crucible. It reflects nothing more than the drafting or view of an agency staff member that has not been considered carefully by the agency itself. "Hence, it is not necessarily reliable evidence of an agency's considered view of the issue." *Commodity Futures Trading Comm'n v. Hanover Trading Corp.*, 34 F.Supp.2d 203, 206 n.19 (S.D.N.Y.1999).

Continuing with the accepted analogy between administrative consent orders and judicial consent decrees, it is clear that the 1971 and 1995 FTC orders cannot be considered to have industrywide legal force. The United States Supreme Court has explained:

> "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." (Emphases in origi-

nal.) *United States v. Armour & Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256, 263 (1971).

Thus, a court has no authority to expand or contract a consent order's terms to reflect "what might have been." *Willie M. v. Hunt*, 657 F.2d 55, 60 (4th Cir. 1981).

This authority demonstrates that it is simply incorrect for the court to refer to the 1971 and 1995 consent orders as establishing FTC policy. Only the FTC commissioners can formally adopt policy. The FTC staff members who drafted the consent orders cannot make agency policy. Further, the orders have not been subjected to adversarial testing. The 1971 and 1995 consent orders must be viewed only as what they are: two private agreements between the FTC and individual cigarette companies without industrywide force of law.

It is clear from the long history of FTC regulation of the cigarette industry, as described in the court's opinion, that consent orders are economic, *i.e.*, they are not based on substantive law. The cases before the FTC are filed as a result of competitors complaining one against the other. They are simply administrative and are not binding authority. At most they may be persuasive to other participants in the industry. Indeed, in Part I(A) of the court's opinion ("History of FTC Regulation of the Cigarette Industry"), the court mentions *Federal Trade Comm'n v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C.Cir.1985), which I believe to be instructive on this point. 219 Ill.2d at 201, 302 Ill.Dec. at 14-15, 848 N.E.2d at 14-15. In *Brown & Williamson*, the manufacturer claimed that its Barclay brand of cigarettes contained 1 milligram of tar. Brown & Williamson's competitors complained that the design of the Barclay filter caused it to register very low tar measurements. Publishing its findings, the FTC determined that the Barclay claim was false and deceptive. The FTC attempted to require Brown and Williamson to state a higher tar content. Brown & Williamson refused and retained the 1 milligram claim,

but voluntarily qualified the claim. The FTC thereafter sought an injunction to prevent such advertising. *Brown & Williamson*, 778 F.2d at 37-38. Even after making published findings, the FTC nonetheless had to resort to a court order to enforce compliance. In my view, this demonstrates why the FTC's "voluntary" compliance scheme cannot equate to formal agency rulemaking.

Despite the uncertain nature of FTC involvement in this area, the court today concludes that the FTC's "informal regulatory activity, including the use of consent orders," satisfies the requirement of section 10b(1) (219 Ill.2d at 258, 302 Ill.Dec. at 45-46, 848 N.E.2d at 45-46) and has the force of law. I very much doubt, however, that a federal court would regard the FTC consent orders as "law" in the context of section 10b(1). For example, in *Wabash Valley Power Ass'n v. Rural Electrification Administration*, 903 F.2d 445 (7th Cir.1990), the Seventh Circuit Court of Appeals was presented with the issue of whether a letter from a federal agency to the regulated business was sufficient for federal preemption. The court held that it was not. The court recognized that to preempt state authority, the agency was required to establish rules with the force of law, and that regulations adopted after notice and comment rulemaking have the effect of law. *Wabash Valley Power*, 903 F.2d at 453-54. However, the court recognized that the agency sent the regulated business a letter. "There was no notice, no opportunity for comment, no statement of basis, no administrative record, no publication in the Federal Register – none of the elements of rulemaking under the [Administrative Procedure Act]. 5 U.S.C. § 553." *Wabash Valley Power*, 903 F.2d at 454 (collecting cases). The court concluded: "Procedural shortcomings prevent giving this letter the force of law." *Wabash Valley Power*, 903 F.2d at 454.

In the present case, as in *Wabash Valley Power*, the FTC has never promulgated an industrywide formal rule. Just as the agency letter in *Wabash* was not based on a formal rule, the two consent orders in this case are not

based on any formal rule. If the letter in *Wabash Valley Power* cannot be considered as "law" as a matter of federal law, then there is no basis for concluding that the consent orders constitute "laws" administered for the purposes of section 10b(1).

As a final matter, the court, in its opinion, "note[s] with great interest" (219 Ill.2d at 263, 302 Ill.Dec. at 48, 848 N.E.2d at 48) a decision by the United States District Court for the Eastern District of Arkansas. *Watson v. Philip Morris Cos., Inc.*, No. 4:03-CV-519 GTE, 2003 WL 23272484 (E.D.Ark., December 12, 2003), *aff'd*, 420 F.3d 852 (8th Cir.2005), involved an Arkansas consumer fraud class action, which charged Philip Morris with the same fraudulent misconduct as in this case. Philip Morris removed the cause from Arkansas state court to federal court pursuant to 28 U.S.C. § 1442(a)(1) (2000), which provides for removal where a person is sued for actions taken under the direction of a federal officer. Philip Morris claimed that it satisfied the requirements of the federal officer statute "because it was acting under the direct control of the [FTC] when it engaged in the allegedly unlawful conduct." *Watson*, 420 F.3d at 854.

A key requirement for federal removal jurisdiction is that the defendant act under the direction of a federal officer.

> "'[R]emoval by a "person acting under" a federal officer must be predicated upon a showing that the acts . . . were performed pursuant to an officer's direct orders or to comprehensive and detailed regulations.' *Virden v. Altria Group, Inc.*, 304 F.Supp.2d 832, 844 (N.D.W.Va.2004) (quoting *Ryan v. Dow Chem. Co.*, 781 F.Supp. 934, 947 (E.D.N.Y.1992)). Mere participation in a regulated industry is insufficient to support removal unless the challenged conduct is 'closely linked to detailed and specific regulations.' *Virden*, 304 F.Supp.2d at 844." *Watson*, 420 F.3d at 857.

The model cases in which private actors have successfully removed cases to federal court under the statute have involved: government contractors with limited discretion; Medicare program contractors because they serve as agents of the federal government; and private actors whose functions are so intertwined with the federal government that they are considered effectively to be federal employees. *Virden v. Altria Group, Inc.*, 304 F.Supp.2d 832, 845 (N.D.W.Va.2004) (and cases cited therein). "Removal under § 1442(a)(1) will not be permitted if the defendant cannot establish direct and detailed control but only that the relevant acts occurred under the general auspices of a federal officer, as would be the case, for example, if the defendant were simply a participant in a regulated industry." *Paldrmic v. Altria Corporate Services, Inc.*, 327 F.Supp.2d 959, 966 (E.D.Wis.2004).

The district court in *Watson* reasoned that the FTC often regulates industries within its purview by compelling voluntary agreements and consent orders rather than by promulgating formal regulations. See 219 Ill.2d at 264, 302 Ill.Dec. at 49, 848 N.E.2d at 49. Further, the district court stated that "the FTC coerced Philip Morris and other cigarette manufacturers into 'voluntary' cooperation with its cigarette labeling and advertising policies 'in such a way that a formal rule' was not required to create federal jurisdiction." See 219 Ill.2d at 265, 302 Ill.Dec. at 49-50, 848 N.E.2d at 49-50. The court of appeals agreed with the district court's view of the record: "We are convinced that the record in this case shows a level of compulsion that establishes that Philip Morris was indeed 'acting under' the direction of a federal officer." *Watson*, 420 F.3d at 859. Regarding the 1970 voluntary agreement: "The FTC effectively used its coercive power to cause the tobacco companies to enter the agreement. * * * This 'voluntary agreement' was a substitute for a formal rule." *Watson*, 420 F.3d at 859. Regarding the consent orders, the court of appeals opined that the consumer fraud class action "directly implicates the enforcement and wisdom of the

FTC's tobacco policies" as explained in the 1971 consent order. *Watson*, 420 F.3d at 862.

In this case, the court concludes:

> "The issue addressed by the *Watson* court – whether removal to federal court was proper – has no bearing on the present case. However, the federal district court's detailed analysis does support our conclusion that specific authorization for the use of the disputed descriptors may be found in consent orders rather than in formally promulgated trade regulation rules of the FTC." 219 Ill.2d at 265, 302 Ill.Dec. at 49-50, 848 N.E.2d at 49-50.

I respectfully disagree.

I note with great interest that removal actions "have been brought in other jurisdictions, and courts have generally declined to permit Philip Morris to remove, concluding that the FTC did not exercise direct and detailed control over the acts for which it was being sued." *Paldrmic*, 327 F.Supp.2d at 966. Indeed, the federal district courts in *Paldrmic* and *Virden* candidly acknowledged the contrary holding of the district court in *Watson*. *Paldrmic*, 327 F.Supp.2d at 966 n.2; *Virden*, 304 F.Supp.2d at 846. Likewise, the court of appeals in *Watson* candidly acknowledged the contrary holding of the district courts. *Watson*, 420 F.3d at 857-59. Although the district court's reasoning in *Watson* was affirmed on appeal, *Watson* was the only district court to hold that the FTC "regulated" the use of the disputed descriptors to such a degree as to qualify for federal officer removal jurisdiction.

The *Virden* and *Paldrmic* courts recognized that Philip Morris has never acted as an agent or an employee of the federal government. *Virden*, 304 F.Supp.2d at 846. "At most, it [Philip Morris] is a private corporation doing business in a regulated industry." *Paldrmic*, 327 F.Supp.2d at 968. Indeed, in the court of appeal's decision in *Watson*, a member of that panel concurred "to emphasize that our decision today should not be construed as an invitation to every participant in a heavily regulated in-

dustry to claim that it, like Philip Morris, acts at the direction of a federal officer merely because it tests or markets its products in accord with federal regulations." *Watson*, 420 F.3d at 863 (Gruender, J., concurring). The concurring judge believed that "in most instances, a contract, principal-agent relationship, or near-employee relationship with the government will be necessary to show the degree of direction by a federal officer necessary to invoke removal under 28 U.S.C. § 1442(a)(1)." *Watson*, 420 F.3d at 863 (Gruender, J., concurring). However, because the concurring judge viewed the level of FTC regulation of the cigarette industry as "extraordinary," he opined that "this is a rare case in which federal officer jurisdiction is appropriate even in the absence of a contract, principal-agent relationship, or near-employee relationship with the government." *Watson*, 420 F.3d at 864 (Gruender, J., concurring).

However, as the *Virden* court concluded: "The indicia of federal control present in cases finding federal officer removal jurisdiction are wholly lacking here." *Virden*, 304 F.Supp.2d at 846. In *Paldrmic*, the court found that Philip Morris did not establish that its use of the disputed descriptors "was mandated by the FTC." *Paldrmic*, 327 F.Supp.2d at 966. Both courts focused on the voluntary nature of the 1970 agreement. According to the *Virden* court, "the most that can be said is that the FTC has been impliedly regulating the tobacco industry through its tacit acceptance of a voluntary private agreement made thirty years ago." *Virden*, 304 F.Supp.2d at 846. The *Paldrmic* court reasoned: "while it may be true that the cigarette companies preferred an agreement to a regulation, the fact remains that they entered into the agreement voluntarily." *Paldrmic*, 327 F.Supp.2d at 966. These courts, therefore, reasoned:

> "On some level the FTC clearly has coercive control over the tobacco companies' tar and nicotine advertising based on its power to regulate deceptive advertising. However, in this Court's opinion, nei-

> ther the right to control, nor the threat of taking control, constitutes the direct and detailed control required for the application of federal officer removal jurisdiction." *Virden*, 304 F.Supp.2d at 846-47.

See *Paldrmic*, 327 F.Supp.2d at 966.

I disagree with the reasoning in *Watson*, on which the court relies, and agree with the better-reasoned decisions such as *Paldrmic* and *Virden*.

In light of the above, I believe that a proper statutory construction analysis leads to the conclusion opposite to that reached by the majority. The analysis must begin with our Consumer Fraud Act, viewed as a whole. Its plain language mandates expansive coverage and the use of judicial construction to effectuate that mandate. Section 10b of the Consumer Fraud Act exempts from the Act conduct "specifically authorized by laws administered by" Illinois or federal regulatory bodies. In this case, the two consent orders upon which PMUSA relies, directed at other parties, did not establish an industrywide standard of conduct for PMUSA. Stated simply, PMUSA did not carry its burden in proving the existence of this affirmative defense.

Further, *regardless of* how the FTC views the role of consent orders in industrywide rulemaking, for purposes of the Consumer Fraud Act, including section 10b(1), a court may not *expand* the exemption of section 10b(1) by implication. I do not believe that the consent orders in this case are sufficient to "specifically authorize" PMUSA's use of the disputed descriptors, so as to exempt that conduct from the statutorily mandated expansive scope of the Consumer Fraud Act.

III. Damages

Although I could end my dissent here, I feel compelled to address the special concurrence's suggestion that reversal is warranted for a "more basic reason" than section 10b(1). The special concurrence claims that plaintiffs

failed to establish that they sustained actual damages and suggests the absence of actual damages is an alternate basis for the result the majority reaches. The special concurrence applies the wrong measure of damages, however, to plaintiffs' consumer fraud claim. A proper application of the law to the facts at issue leads to the conclusion that the alternate basis suggested by the special concurrence is lacking in merit.

The special concurrence begins with a frank assessment of the deceptive practices employed by PMUSA in promoting its cigarette products:

> "The record in the case before us shows that PMUSA developed and marketed Marlboro Lights and Cambridge Lights cigarettes in response to heightened public concern over health risks posed by smoking. The company believed that it could forestall declining sales by offering a product which consumers perceived as better for them than conventional 'full-flavored' brands. Pursuant to that strategy, PMUSA advertised Marlboro Lights and Cambridge Lights cigarettes in a way that led consumers to believe that the brands posed a lower health risk than their 'full flavored' counterparts. In reality, and as PMUSA was fully aware, the so-called 'light' cigarettes not only offered no health benefits, but were actually more toxic." 219 Ill.2d at 276, 302 Ill.Dec. at 56-57, 848 N.E.2d at 56-57 (Karmeier, J., specially concurring, joined by Fitzgerald, J.).

The special concurrence further comments, "When a consumer chooses one product over another in the belief that it will be less harmful to his or her health, only to discover later that it may have been more harmful, the existence of damages might seem self-evident." 219 Ill.2d at 276, 302 Ill.Dec. at 58, 848 N.E.2d at 58 (Karmeier, J., specially concurring, joined by Fitzgerald, J.). The "self-evident" nature of the damages, however, hardly gives pause to the special concurrence in its quest to prove that plaintiffs failed to establish actual damages.

The special concurrence notes that class representative Sharon Price "continued smoking PMUSA's light cigarettes even after this litigation alerted her to the fact that the cigarettes were not, in fact, any healthier and may actually be more harmful than the regular version of those cigarettes." 219 Ill.2d at 277, 302 Ill.Dec. at 58, 848 N.E.2d at 58 (Karmeier, J., specially concurring, joined by Fitzgerald, J.). Additionally, the special concurrence notes that "[n]ews that PMUSA's low tar and light representations were illusory" did not deter class representative Michael Fruth "from continuing to smoke, although he testified that he did switch back from lights to regulars." 219 Ill.2d at 277, 302 Ill.Dec. at 59, 848 N.E.2d at 59 (Karmeier, J., specially concurring, joined by Fitzgerald, J.). From these observations, the special concurrence concludes:

> "Whatever valuation the class representatives may have placed on the health component of light cigarettes, that valuation had no observable economic consequences. Neither Price nor Fruth offered any testimony suggesting that switching from regulars to lights resulted in their paying any more for cigarettes than they would have otherwise. There was no price disparity between light cigarettes and their full-flavored counterparts, and there is no indication that the switch from regulars to lights caused them to buy more packages of cigarettes. The price they paid did not go up. The quantity they purchased did not increase.[5] No additional ancillary or incidental costs were identified. Moreover, neither Price nor Fruth complained that

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[5] My reading of the record differs on this point from that of the special concurrence. When Price switched to Cambridge Lights in 1986, she smoked one pack of cigarettes a day. Her consumption increased to 1½ packs of cigarettes a day. In 2002, after she learned of the lawsuit, Price was able to reduce her cigarette consumption to one-half to one pack per day. A summary of Price's cigarette consumption admitted into evidence as Plaintiffs' Exhibit 99 reflected the increase in cigarette consumption.

> the cigarettes were not worth what they paid for them. To the contrary, Price's continued purchase of lights even after being alerted to their lack of health benefits suggests that she was entirely satisfied with the value of what she received for her cigarette-purchasing dollar." 219 Ill.2d at 277-78, 302 Ill.Dec. at 56-57, 848 N.E.2d at 56-57 (Karmeier, J., specially concurring, joined by Fitzgerald, J.).

Having explained that the class representatives did not sustain damages because they continued to smoke after learning the true nature of light cigarettes, the special concurrence makes a similar argument regarding smokers and class members in general. The special concurrence recognizes that the Knowledge Network Survey respondents placed a "lower subjective value on cigarettes that lacked the health qualities claimed by PMUSA in its marketing of Marlboro Lights and Cambridge Lights." 219 Ill.2d at 281, 302 Ill.Dec. at 58, 848 N.E.2d at 58 (Karmeier, J., specially concurring, joined by Fitzgerald, J.). However, the special concurrence maintains that real world "consumers would not have paid less to satisfy their tobacco habits had the lights' true properties been known." 219 Ill.2d at 281, 302 Ill.Dec. at 58, 848 N.E.2d at 58 (Karmeier, J., specially concurring, joined by Fitzgerald, J.). According to the special concurrence, "consumers would not have stopped smoking, for they were addicted, and they could not have bought cigarettes that cost 77.7% less or 92.3% less,[6] for no such cigarettes existed. At most, they would have reverted back to 'full-flavored' versions of the cigarettes." 219 Ill.2d at 281-82, 302 Ill.Dec. at 58, 848 N.E.2d at 58 (Karmeier, J., specially concurring, joined by Fitzgerald, J.). Since the price of light cigarettes and regular cigarettes were the same at

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[6] The Knowledge Network Survey respondents would have demanded a discount of 77.7% had they known that light cigarettes did not provide any health benefit when compared to the full-flavored cigarettes, and a discount of 92.3% had they known that light cigarettes were more harmful than regular cigarettes.

all times, the special concurrence concludes that "while PMUSA's misrepresentations may have deceived consumers into altering their purchasing decisions, the net change in consumers' economic position as a result of those misrepresentations was zero." 219 Ill.2d at 282, 302 Ill.Dec. at 58, 848 N.E.2d at 58 (Karmeier, J., specially concurring, joined by Fitzgerald, J.).

The special concurrence's analysis, as it applies to both the class representatives and to the members of the class, suffers from a fundamental misunderstanding of the measure of damages in an action that is based upon a fraudulent misrepresentation made by a defendant. This court's opinions in *Drew v. Beall*, 62 Ill. 164, 1871 WL 8348 (1871), and *Gerill Corp. v. Jack L. Hargrove Builders*, 128 Ill.2d 179, 131 Ill.Dec. 155, 538 N.E.2d 530 (1989), are particularly instructive. In *Drew*, the plaintiff traded a house and lot in Dixon, Illinois, in return for acreage in Missouri and the sum of $800. The plaintiff charged that the defendant had made certain misrepresentations concerning the Missouri land. The defendant sought to limit the plaintiff's damages, arguing the proper measure of damages was the value of the house and lot in Dixon, less the $800, and less the actual value of the land in Missouri. The defendant maintained that this would restore the plaintiff to the condition he was in before the exchange of property. On appeal, the defendant argued the trial court should have allowed the jury to hear testimony regarding the value of the house and lot in Dixon. This court disagreed, holding that the proper measure of damages was "the difference between the actual value of the land and the value of such a tract of land as defendant's land was represented to be, and the value of the Dixon house and lot was not properly involved." *Drew*, 62 Ill. at 168. The court reasoned that the "parties had, by their agreement fixed an estimate and value upon the property which each sold and transferred to the other, and it was not for the jury to make a new contract for them, or fix a new price upon the plaintiff's property for them. The

plaintiff was entitled to the benefit of his bargain." *Drew*, 62 Ill. at 168.

The court in *Drew* thus sharply distinguished between the benefit-of-the-bargain rule for the measure of damages in cases of fraud and deceit and the out-of-pocket rule measure of damages.[7] The plaintiff in a fraud and deceit case is not merely entitled to be placed in the condition he was in before the bargain was made. He is entitled to the benefit of his bargain. Moreover, the courts will not rewrite the plaintiff's bargain by assigning a different price to an item than what the plaintiff and defendant originally agreed to.

In *Gerill*, 128 Ill.2d at 179, 131 Ill.Dec. 155, 538 N.E.2d 530, Gerill Corporation and Jack L. Hargrove Builders, Inc., had formed a joint venture to develop land owned by Gerill in Woodridge, Illinois. Eventually, the parties approached John Rosch with the proposition that Rosch purchase Hargrove's interest in the joint venture. Rosch purchased Hargrove's interest after reviewing a 19-page handwritten list of the joint venture's outstanding loans and open invoices prepared by Hargrove. Upon consummation of the sale, Rosch's accountant discovered that Hargrove had misrepresented the joint venture's liabilities in that a number of liabilities related to the Woodridge properties had either been omitted from the list or misstated. The circuit court awarded damages to Rosch

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[7] According to W. Keeton, Prosser & Keeton on Torts § 110, at 767-68 (5th ed.1984), the "out of pocket" rule, followed by a minority of perhaps a dozen American jurisdictions, "looks to the loss which the plaintiff has suffered in the transaction, and gives him the difference between the value of what he has parted with and the value of what he has received. If what he received was worth what he paid for it, he has not been damaged, and there can be no recovery." In contrast, the loss-of-bargain rule, adopted by some two-thirds of the courts which have considered the question in actions for deceit, "gives the plaintiff the benefit of what he was promised, and allows recovery of the difference between the actual value of what he has received and the value that it would have had if it had been as represented."

for Hargrove's fraudulent misrepresentations and the appellate court affirmed.

In this court, Hargrove argued that the circuit court's computation of damages was incorrect. Hargrove claimed that under the benefit-of-the-bargain rule, damages for fraudulent misrepresentation must be based upon the amount of money the plaintiff paid as a result of the misrepresentation. Thus, Hargrove argued, the circuit court should not have excluded evidence that the misrepresented liabilities were either never paid or were not paid until after Rosch sold his interest in the joint venture. The court rejected this argument, reasoning:

> "Under the benefit-of-the-bargain rule, which governs the damage computations in fraudulent misrepresentation cases, damages are determined by assessing the difference between the actual value of the property sold and the value the property would have had if the misrepresentations had been true. (*Hicks v. Deemer* (1900), 187 Ill. 164, 170 [58 N.E. 252]; *Munjal v. Baird & Warner, Inc.* (1985), 138 Ill.App.3d 172, 186-87 [92 Ill.Dec. 809, 485 N.E.2d 855]; *Kinsey v. Scott* (1984), 124 Ill.App.3d 329, 341 [79 Ill.Dec. 584, 463 N.E.2d 1359].) In this case, it was found that Hargrove represented the joint venture's liabilities as being less than they actually were. The proper measure of damages under the benefit-of-the-bargain rule, then, and the formula that was used by the circuit court, was the difference between the joint venture's liabilities as misrepresented by Hargrove and what those liabilities actually were. How Rosch or the joint venture subsequently dealt with those liabilities was irrelevant to this determination." *Gerill*, 128 Ill.2d at 196, 131 Ill.Dec. 155, 538 N.E.2d 530.

The *Gerill* court restated that the proper measure of damages in an action for fraudulent misrepresentation is the difference between the actual value of the property sold and the value the property would have had if the

misrepresentations had been true. The court added that the bargain, and the measure of damages, *are not affected by subsequent actions.* Rosch might or might not have been held liable for the full amount of the liabilities of the joint venture. However, whether Rosch was made to pay for the liabilities mattered not to the determination of damages. See also *Antle & Brothers v. Sexton*, 137 Ill. 410, 416, 27 N.E. 691 (1891) (where the land conveyed consisted of 30 acres rather than 80 acres as represented, the trial court did not err "in refusing evidence tending to show that notwithstanding the shortage [in acreage] plaintiffs got the worth of their money in the whole trade"); *Kinsey v. Scott*, 124 Ill.App.3d 329, 79 Ill.Dec. 584, 463 N.E.2d 1359 (1984) (holding the proper measure of damages was the difference in value between the apartment building as a five-unit structure including a basement unit and as a four-unit structure in 1973, the year of the purchase. In addition, the rental income which the plaintiff received from the basement unit, which defendant had not built to code, from 1973 to 1981 also belonged to the plaintiff as owner of the building). And see *City of Chicago v. Michigan Beach Housing Cooperative*, 297 Ill.App.3d 317, 231 Ill.Dec. 508, 696 N.E.2d 804 (1998) (observing that in an appropriate case, a plaintiff may recover the difference between the value of the note or security interest as represented, and the value of the note or security interest received); *Kleinwort Benson N. America v. Quantum Financial Services*, 285 Ill.App.3d 201, 220 Ill.Dec. 457, 673 N.E.2d 369 (1996) (reversing entry of summary judgment and holding that a question for a fact finder existed as to the amount of damages where counterclaimant purchased the company at a premium and evidence showed that, without the promised institutional sale force, the company had no value beyond the book value of assets); *Poeta v. Sheridan Point Shopping Plaza Partnership*, 195 Ill.App.3d 852, 142 Ill.Dec. 507, 552 N.E.2d 1248 (1990) (holding that a benefit-of-the-bargain analysis for damages is appropriate in an action for fraud); *Four "S" Alliance, Inc. v. American National*

Bank & Trust Co. of Chicago, 104 Ill.App.3d 636, 640, 60 Ill.Dec. 314, 432 N.E.2d 1213 (1982) (trial court properly applied the benefit-of-the-bargain formula in awarding plaintiff "the profit difference for the gas actually sold during the three months [at the gas station plaintiff leased from defendants] and the volume of sales which had been represented orally").

The special concurrence and PMUSA concede that the proper measure of damages in the case at bar, as in an action for common law fraudulent misrepresentation, is the benefit-of-the-bargain. 219 Ill.2d at 276, 302 Ill.Dec. at 56, 848 N.E.2d at 56 (Karmeier, J., specially concurring, joined by Fitzgerald, J.). Having made that concession, however, the special concurrence applies a measure of damages that is closer to the out-of-pocket measure of damages than the benefit-of-the-bargain measure. In the process, the special concurrence impermissibly rewrites the bargain that plaintiffs entered into in purchasing light cigarettes from PMUSA. As to the class representatives, the focus of the analysis that the special concurrence employs is the continued use of cigarettes by the representatives beyond the time that they learned the true properties of light cigarettes. The special concurrence maintains that, since the class representatives continued to smoke after they learned that the health benefits were illusory, the class representatives could not have placed any real value on the health components of light cigarettes, and hence could not have suffered any economic loss when the representations regarding the health benefits turned out to be false. The special concurrence thus looks beyond the time frame of the bargain between the parties, and rewrites the bargain in light of the representatives' subsequent behavior. In other words, rather than look to the time frame when plaintiffs were deceived by PMUSA's representations and purchased light cigarettes for their perceived health benefits, the special concurrence looks to the time frame when the class represen-

tatives learned of the falsity of the representations.[8] The fact that the class representatives knew of the true properties of light cigarettes in the second time frame and bargained for cigarettes based on that knowledge, however, does not in any way undercut the damages they sustained in the first time frame, when they purchased light cigarette for the health benefits touted by PMUSA.

A simple illustration makes the point. I purchase 10 acres of land for development upon a representation that the land is never subject to flooding. After constructing houses on nine acres, I discover that the remaining acre is not suitable for development because it lies below the flood plain and is subject to periodic flooding. I construct a fishing pond on part of the remaining acre and leave the balance in its natural state so the purchasers of the houses may benefit from the view. Under the benefit-of-the-bargain measure of damages, I am entitled to the difference between the value of the land as promised, that is, the value of land suitable for development *in toto*, and the value of the land as received, that is, the value of land with only nine acres suitable for development. Contrary to this approach, the special concurrence would focus on the development of the fishing pond and the benefit of the natural view, and conclude that I must have placed a higher value on the land received since I was able to find some use for it. The special concurrence would rewrite my bargain by assigning a greater value to the land based on my actions subsequent to the time of the purchase.

The special concurrence repeats the same mistake in its analysis regarding the class members in general. As noted above, the special concurrence recognizes that the

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[8] The class period for purchases of Cambridge Lights was from 1986 to 2001. The class period for purchases of Marlboro Lights was from 1971 to 2001. Plaintiffs did not seek damages for cigarette purchases made outside of those time periods. For example, class representative Sharon Price testified that she learned that light cigarettes were not truly lower in tar and nicotine in the spring of 2002. Plaintiffs entered into evidence a summary of her cigarette purchases from 1986 until February 1, 2001.

Knowledge Network Survey respondents placed a lower value on cigarettes that lacked the health qualities claimed by PMUSA. However, the special concurrence does not focus on the difference between the value of the cigarettes as represented by PMUSA and the value of the cigarettes without the health benefits. Instead, the special concurrence focuses on two factors: (1) discounted cigarettes were not available for purchase in the marketplace; and (2) the class members were addicted to the use of cigarettes. From these factors the special concurrence concludes that the class members did not incur damages, and are not entitled to compensation, because they would have purchased cigarettes at the nondiscounted prices to continue feeding their addiction.

In essence, the special concurrence rewrites the bargain that plaintiffs made. The special concurrence ignores the evidence that cigarette consumers would have required a steep discount to purchase light cigarettes without the health benefits. Instead, the special concurrence asserts that cigarette consumers would have continued to purchase light cigarettes, at nondiscounted prices, even knowing the true properties of the cigarettes. In the alternative, the special concurrence asserts that cigarette consumers would have purchased regular cigarettes at a price equal to the price paid for light cigarettes as misrepresented by PMUSA. But the focus under the benefit-of-the-bargain is the difference in value, as of the time of the transaction, between the goods as received and the goods as promised. Thus, the *Gerill* court focused on the difference between the joint venture's liabilities as misrepresented and what those liabilities actually were. How Rosch subsequently dealt with those liabilities was irrelevant to the determination of damages. Hargrove could not share in the forgiveness of any of the liabilities by rewriting the bargain to assign a higher value to the joint venture.

The result that the special concurrence advocates is, at best, surprising. PMUSA misrepresented the qualities of

its light cigarettes. The misrepresentations led cigarette consumers to overcome their aversion to the taste of light cigarettes and purchase light cigarettes in an unsuccessful attempt to lower their intake of the harmful products to which they were exposed in smoking cigarettes. While PMUSA saw its profits increase because of the sale of light cigarettes, cigarette consumers did not receive the health benefits for which they bargained. The special concurrence dispenses with the inequities in the transaction, however. So long as the price the consumers paid for the false light cigarettes was no more than the price for the nonbargained for cigarettes, PMUSA could make misrepresentations of whatever kind it desired.

When considered in light of the addictive nature of cigarettes, the special concurrence's position is not only surprising but untenable. Recall the special concurrence's acknowledgment that "PMUSA was fully aware, the so-called 'light' cigarettes not only offered no health benefits, but were actually more toxic." 219 Ill.2d at 276, 302 Ill.Dec. at 56, 848 N.E.2d at 56 (Karmeier, J., specially concurring, joined by Fitzgerald, J.). Also recall the special concurrence's claim that cigarette consumers could "not have stopped smoking, for they were addicted." 219 Ill.2d at 281, 302 Ill.Dec. at 58, 848 N.E.2d at 58 (Karmeier, J., specially concurring, joined by Fitzgerald, J.). The stepping stones to the special concurrence's position are as follows. Cigarette manufacturers, including PMUSA, could market a highly addictive and toxic product, a cigarette, with the result that the consumer became addicted to the product. PMUSA could then market a light cigarette, just as addictive as a full-flavored cigarette, that it claimed contained less toxic compounds than a full-flavored cigarette. Consumers could flock to the light cigarette, believing the misrepresentations regarding the health benefits flowing from the claimed reduction of toxic compounds in the light cigarette. PMUSA could reap increased profits as customers switched to the light cigarette marketed by PMUSA. However, consumers could not recover for the misrepresentations because they

could not break free of the addiction directly flowing from PMUSA's marketing of full-flavored and light cigarettes.

Far from bolstering the result reached by the majority, the special concurrence serves as a reminder of the problems associated with the out-of-pocket measure of damages in an action for fraud or deceit. In an opinion joined by the author of today's majority opinion, our appellate court observed:

> "The rule set forth in [*Perry v. Engel*, 296 Ill. 549 [130 N.E. 340] (1921)] comports with section 549, comment I of the Restatement (Second) of Torts, which discusses the measure of damages in misrepresentation cases where the recipient of the misrepresentation has suffered no out-of-pocket loss. That section provides as follows:
>
> > 'When the value of what the plaintiff has received under the transaction with the defendant is fully equal to the value of what he has parted with, he has suffered no out-of-pocket loss, and under the rule stated in subsection (1), clause (a) [providing that the recipient of misrepresentation may choose to recover his actual out-of-pocket loss], he could recover no damages. This would mean that the defrauding defendant has successfully accomplished his fraud and is still immune from an action in deceit. Even though the plaintiff may rescind the transaction and recover the price paid, the defendant is *enabled to speculate on his fraud and still be assured that he can suffer no pecuniary loss. This is not justice between the parties.* The admonitory function of the law requires that the defendant not escape liability and justifies allowing the plaintiff the benefit of his bargain.' (Emphasis added.) Restatement (Second) of Torts § 549, Comment I, at 115 (1977).

> See also W. Keeton, Prosser & Keeton on Torts § 110, at 768 (5th ed.1984) ('in many cases the out-of-pocket measure will permit the fraudulent defendant to escape all liability and have a chance to profit by the transaction if he can get away with it')." *Kirkruff v. Wisegarver*, 297 Ill.App.3d 826, 837, 231 Ill.Dec. 852, 697 N.E.2d 406 (1998).

Perhaps these words still ring true in the heart of the author of today's majority opinion, and are the reason that the majority of the court does not endorse the position advanced by the special concurrence. Be that as it may, I note that the proper measure of damages in Illinois in a fraud and deceit action, whether based on statute or at common law, is the benefit-of-the-bargain, rather than the out-of-pocket measure of damages or some close relative thereof. I note further that the record contains sufficient evidence to support an award of damages to the plaintiff class. Several members of the class testified that they switched to light cigarettes because they wanted to reduce their exposure to the harmful compounds in regular cigarettes. Class representative Sharon Price testified that, having switched to light cigarettes because of concerns about lung cancer and other diseases, she would not have gone back to regular cigarettes even if they were offered to her for free. In a similar vein, the Knowledge Network Survey respondents stated that they would have required a steep discount had they known that light cigarettes either did not offer any health benefits compared to regular cigarettes or were actually more harmful than regular cigarettes. The fact remains that the members of the plaintiff class were defrauded because of the misrepresentations made by PMUSA regarding light cigarettes. Illinois law should not tolerate the use of deceptive practices aimed at defrauding the consumers of this state.

IV. Conclusion

Today marks the second time in just six months that this court has completely reversed a multibillion dollar verdict in favor of a corporate defendant. See *Avery v.*

State Farm Mutual Automobile Insurance Co., 216 Ill.2d 100, 296 Ill.Dec. 448, 835 N.E.2d 801 (2005). To do so in *Avery*, the court construed an insurance contract strictly against an insured despite its ambiguities and our own precedent to the contrary. See *Avery*, 216 Ill.2d at 215-29, 296 Ill.Dec. 448, 835 N.E.2d 801 (Freeman, J., concurring in part and dissenting in part, joined by Kilbride, J.). In this case, the court does so by interpreting section 10b(1) so narrowly that it dilutes the very purpose of the Act. In addition, not content with just speaking to section 10b(1), the two specially concurring justices engage in nothing more than a conclusory analysis on damages-an analysis which, as I have detailed above, overlooks or ignores several salient legal points which serve to greatly undercut their position. Suffice it to say, the issue of damages is not as cut and dry as these justices would have one believe.

The manner in which these two, highly publicized cases have been decided by this court leads me to several troubling conclusions. First, a majority of this court has become increasingly desensitized to the interests of the average Illinois consumer. There is little doubt in my mind that these decisions will send a chill wind over consumer protection. That said, I am not blind to the very real problems that exist in the world of class action lawsuits. As I stated in my separate opinion in *Avery*, I share in the concerns that the class action vehicle has the potential to be greatly abused. However, that concern must not transcend the rules of law that have been set by this court in past decisions. In my view, this means that all cases, even class actions filed in our Fifth District, must be guided by the same long-recognized standards of review, rules of construction, procedural requirements, and burdens of proof that have guided all other types of actions over the years. Aspects of the court's opinion today and in its opinion in *Avery* cause me to fear that a majority of my colleagues will continue to hold large class actions to different standards in an effort to reduce the perception that

the Illinois court system serves as a playpen for the disingenuous class action practitioner.

Justice KILBRIDE joins in this dissent.

Justice KILBRIDE, also dissenting:

I fully agree with all aspects of Justice Freeman's dissent and I join in it. I write separately to express additional concerns with the majority opinion.

The majority notes that neither party has offered argument regarding the meaning of the phrase "by laws administered by" in section 10b(1) of the Consumer Fraud Act. 219 Ill.2d at 244, 302 Ill.Dec. at 37, 848 N.E.2d at 37. The majority then concludes that the phrase reflects legislative intent requiring deference to agency policy and practice in its performance of duties delegated by Congress or the General Assembly. 219 Ill.2d at 244, 302 Ill.Dec. at 37, 848 N.E.2d at 37. As support for this conclusion, the majority asserts the legislature would have referred to state or federal statutes, rather than laws, if it intended to require that specific authorization be contained in the law itself. 219 Ill.2d at 244, 302 Ill.Dec. at 37-38, 848 N.E.2d at 37-38. The majority fails to explain or describe any conceptual difference between "laws" and "statutes." The majority's conclusion therefore does not logically follow from the premise. Further, although the majority acknowledges that the term "specifically authorized" in the statute "indicates a legislative intent to require a certain degree of specificity or particularity in the authorization" (219 Ill.2d at 244, 302 Ill.Dec. at 38, 848 N.E.2d at 38), it points to no specificity or particularity in the claimed authorization here. Indeed, "agency policy and practice" and the consent orders relied on by the majority as authorization are neither specific nor particular.

Nowhere in section 10b(1) is there any reference to "agency policy and practice." Yet the majority concludes that agency policy and practice have the force of law. Statutes and published rules made in accordance with statutory authority are clearly "laws administered by a

regulatory body." To the extent statutes and published rules authorize certain conduct, that conduct cannot serve as a predicate for an action under the Consumer Fraud Act. That was the import of this court's holding in *Lanier*.

Lanier did not, however, hold that agency policy and practice allowed use of the unexplained "Rule of 78's" term in loan documents. Instead, we held that Regulation Z permitted use of the term without further elaboration. Regulation Z is a set of comprehensive rules, enacted and published by the Federal Reserve Board, pursuant to authority granted by Congress implementing the principles of the Truth in Lending Act. *Lanier*, 114 Ill.2d at 11, 101 Ill.Dec. 852, 499 N.E.2d 440. In holding the conduct complained of was specifically authorized by law, we relied on a formal, published Federal Reserve Board staff interpretation of a section of Regulation Z. That regulation required identification of the method of computing any unearned portion of the finance charge in the event of prepayment. The published staff interpretation concluded that a simple reference by name to the "Rule of 78's" without describing its operation satisfied the identification requirement. *Lanier*, 114 Ill.2d at 12, 101 Ill.Dec. 852, 499 N.E.2d 440.

We held that the Federal Reserve Board's formal, *published* interpretation of its own rules is entitled to great deference, absent any obvious repugnance to the Truth in Lending Act. *Lanier*, 114 Ill.2d at 13, 101 Ill.Dec. 852, 499 N.E.2d 440. We observed that the Truth in Lending Act absolved creditors from liability "for 'any act done or omitted in good faith in conformity with any rule, regulation, *or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations.*' [Citation.]" (Emphasis added.) *Lanier*, 114 Ill.2d at 14, 101 Ill.Dec. 852, 499 N.E.2d 440.

We concluded that the foregoing provision evinced a congressional determination to treat the Board's adminis-

trative determinations under the Truth in Lending Act as authoritative. *Lanier*, 114 Ill.2d at 14, 101 Ill.Dec. 852, 499 N.E.2d 440. Thus, we held section 10b(1) of the Consumer Fraud Act exempted from liability conduct authorized by federal statutes and regulations, including those administered by the Federal Reserve Board, and that "defendant's compliance with the disclosure requirements *of the Truth in Lending Act* is a defense to liability under the Illinois Consumer Fraud Act in the present case." (Emphasis added.) *Lanier*, 114 Ill.2d at 18, 101 Ill.Dec. 852, 499 N.E.2d 440.

It is apparent, therefore, that *Lanier* upheld the creditor's section 10b(1) defense because the disclosure was specifically authorized by the federal Truth in Lending Act. We found defendant complied with the requirements of the Act because a formal, published agency interpretation of a regulation authorized by Congress, specifically authorized the disputed conduct.

Conversely, the record in this case does not present a basis for application of *Lanier*. Congress has empowered and directed the Federal Trade Commission to prevent the use of unfair or deceptive acts or practices in or affecting commerce. 15 U.S.C. § 45. It has also delegated rulemaking authority to the Commission. 16 C.F.R. § 1.22. As the defendant's expert, Dr. Peterman, conceded, the Commission has never promulgated any rule authorizing the use of the specific descriptors at issue in this case. The Commission is primarily an enforcement agency charged with protecting consumers from unfair and deceptive trade practices. Unlike the Truth in Lending Act, the Federal Trade Commission Act contains no provision absolving from liability persons who in good faith comply with official interpretations of its regulations. Further, as the Commission has not published any functional equivalent to Regulation Z, there is no comparable Commission regulation governing the conduct at issue here.

Hence, *Lanier* offers no support for the conclusion that use of the descriptors claimed to be deceptive in this case is specifically authorized by federal law. *Lanier* teaches only that section 10b(1) can bar a Consumer Fraud Act remedy if the conduct is specifically authorized by a federal law. It neither holds nor suggests that informal agency policy or policy enforcement techniques short of formal, published rulemaking could invoke the section 10b(1) exemption from liability. The majority concludes, however, that "the FTC's informal regulatory activity, including the use of consent orders, comes within the scope of section 10b(1)'s requirement that the specific authorization be made 'by laws administered by' a state or federal regulatory body," contending that this assertion "is consistent with our holding in *Lanier*." 219 Ill.2d at 258, 302 Ill.Dec. at 46, 848 N.E.2d at 46. Again, *Lanier* simply offers no support for this conclusion.

Additionally, the majority acknowledges, as noted in my special concurrence in *Jackson*, that mere compliance with applicable law does not necessarily bar Consumer Fraud Act liability and that, rather, the conduct at issue must be specifically authorized. 219 Ill.2d at 249, 302 Ill.Dec. at 42-43, 848 N.E.2d at 42-43. Yet, the majority effectually ignores that principle in its analysis.

The majority can take no comfort in the reasoning of the Seventh Circuit in *Bober*. The alleged deceptive statement in that case was held specifically authorized by a rule formally adopted by the FDA and codified in the Code of Federal Regulations. *Bober*, 246 F.3d at 941. *Bober* is remarkably similar to this court's holding in *Lanier*, finding a formal published interpretation of a regulation of the Federal Reserve Board to authorize specifically the disclosures in question.

In this case, the federal law in question forbids unfair or deceptive acts or practices affecting commerce. The FTC has issued no formal rule or regulation authorizing the descriptors in question, as in *Bober*, and it has issued no formal interpretations of any regulations, as in *Lanier*.

The majority asserts that *Lanier* is authority for the proposition that an agency staff interpretation may be a sufficient basis for a finding of specific authorization and that formal rulemaking is therefore not a prerequisite for specific authorization. 219 Ill.2d at 252, 302 Ill.Dec. at 42-43, 848 N.E.2d at 42-43. It must be remembered that the staff interpretation in *Lanier* was both formal and published and that Congress expressly provided that reliance on staff interpretations would excuse liability. Opening the door to informal policy advice could lead to absurd results. For instance, advice given casually between an FTC commissioner and a PMUSA executive could not and should not serve as the specific authorization required by section 10b(1). Common sense indicates that no specific authorization by law can derive from informal policymaking or agency practices. Thus, there is no basis for the majority to conclude that either informal agency policy and practice or the use of consent orders involving other parties are within the ambit of our holding in *Lanier*.

Nevertheless, the majority relies on 1971 and 1995 FTC consent orders entered in resolution of claims asserting that American Brands, Inc., and American Tobacco Company, respectively, violated the Act's prohibition of unfair methods of competition and unfair and deceptive acts and practices in commerce. In the case of the 1971 order, the FTC filed a complaint in 1969 detailing advertising claims related to American Brands products it found deceptive. American Brands then agreed, in a consent order, without admitting it violated the law as alleged in the complaint, to refrain from advertising that its cigarettes were low or lower in tar by use of the words "low," "lower" or "reduced," or like qualifying terms, unless the statement is accompanied by a clear and conspicuous disclosure of the tar and nicotine content in milligrams in the smoke produced by the advertised cigarette. *In re American Brands, Inc.*, 79 F.T.C. 255 (1971).

It is apparent that the complaint against American Brands was directed at particular advertising used only by that company. The order forbade only American Brands from making the reduced tar claims, and authorized only American Brands to use "low tar" descriptors only if accompanied by conspicuous disclosures of tar and nicotine content. The order cannot reasonably be viewed as directing the use of the descriptors. Indeed, it *prohibited* their use unless certain conditions were met. No reference whatever is made to the descriptors "light" or "lights," as used by PMUSA. The plain facts, therefore, demonstrate no basis to conclude that "lights" is a like qualifying term to "low in tar." Thus, even if other cigarette marketers read the published consent order, they could not reasonably conclude it specifically authorized any descriptors other than "low tar" or "lower in tar." Nor could they conclude that the agreed resolution of the Commission's claim against American Brands was anything other than the compromise of a disputed claim. It was not, and did not purport to be, a rule or regulation permitting the entire cigarette industry to use these or any other descriptors.

Similarly, the 1995 consent order was entered after the FTC filed a complaint alleging that American Tobacco Company committed unfair and deceptive acts or practices in advertising its Carlton brand of cigarettes. The complaint alleged the advertisements claimed that 10 packs of Carltons contained less tar than one pack of five competing brands. The Commission alleged that, in truth, consumers would not get less tar by smoking 10 packs of Carltons because of the behavior of compensatory smoking. As in the 1971 consent order, American Tobacco entered into an agreement for settlement purposes, without admitting it had violated the law. American Tobacco consented to entry of an order forbidding the disputed representations unless the representations were true as confirmed by competent and reliable scientific evidence. The 1995 order further provided that comparison of the tar and nicotine ratings of American Tobacco's cigarette

brands and the ratings of competing brands, with or without representation that respondent's brand is "low," "lower," or "lowest" in either tar or nicotine, would not be deemed violations of the consent order under certain conditions. Specifically, use of the descriptors was not forbidden if American Tobacco did not visually depict more than a single cigarette or pack of its and the comparative brands. *In re American Tobacco Co.*, 119 F.T.C. 3 (1995).

Like the 1971 consent order, the 1995 consent order made no reference whatever to the terms "light" or "lights." The reference to "low tar" in the 1995 order is clearly not a Commission authorization to use that term or similar terms. It only refers to comparisons of brands *with or without* use of such descriptors. The 1995 consent order merely resolved a disputed claim against American Tobacco Company arising from alleged false advertising of one particular brand of cigarettes. Competitors of American Tobacco Company might look to the order for guidance concerning what advertising practices the Commission may deem unfair or deceptive, but could not reasonably conclude that the use of any descriptors were specifically authorized by the order. The 1995 complaint did not even question American Tobacco's use of particular descriptors. Instead, it contended that American Tobacco's comparative claim was untrue. Thus, that consent order forbade conduct not at issue in this case, and only conditioned use of "low tar" descriptors on American Tobacco's forbearance of using more than a depiction of a single cigarette or pack of its brand versus a single cigarette or pack of any other brand.

Both the 1971 and 1995 consent orders dealt with conduct deemed by the Commission to violate the FTC Act. The orders have the force of law *only* as to the parties entering into the settlement agreements – American Brands and American Tobacco Company. At most, the orders may be predictive of Commission attitudes toward advertising practices in future cases. Simply stated, those consent orders cannot reasonably be deemed to be an indus-

trywide specific authorization for the use of particular advertising descriptors.

Equally important, the FTC has certainly not closed the book on the issue of deceptive cigarette advertising. In 1997, it sought public comment on whether its policies regarding testing methods and the use of descriptors should be revised. At the agency's request, the National Cancer Institute (NCI) studied the issues and, in November 2001, published Monograph 13. The NCI concluded there was no convincing evidence that cigarettes lower in tar and nicotine yield reduced the disease burden on a population basis. Monograph 13 was critical of industry testing practices and its use of comparative descriptors. According to Dr. Peterman, the FTC, at the time of trial, was evaluating whether to change its policies in light of the NCI's conclusions. The ongoing FTC review should indicate to industry competitors that agency policy on the use of cigarette comparative descriptors was, and remains, in a state of flux.

The foregoing illustrates why policies, as opposed to formal published regulations and statutes, cannot be deemed to have the force of law within the meaning of section 10b(1). The legislative purpose of the exemption in section 10b(1) is to shield defendants from liability for conduct specifically authorized by *law*. That purpose is not served if discernment of what is forbidden and what is authorized rests on the shifting sands of ever-changing and evolving agency policy. A statute or published regulation, on the other hand, remains in effect unless formally repealed. Policy change can be effected simply by an agency decision to commence an enforcement proceeding. Thus, consent orders enforceable only against parties to an enforcement proceeding are not laws administered by a federal agency within the meaning of section 10b(1). Accordingly, I agree with the trial court that defendant did not establish its section 10b(1) affirmative defense.

On a different issue, I am compelled to respond to Justice Karmeier's argument that plaintiffs did not prove

damages. Justice Karmeier observes that plaintiffs cited no authority permitting opinions of Internet survey respondents to establish actual damages under the Consumer Fraud Act because the representative plaintiffs have not been harmed in the way the survey respondents claimed they would be in answering the survey hypotheticals. 219 Ill.2d at 278-79, 302 Ill.Dec. at 57, 848 N.E.2d at 57 (Karmeier, J., specially concurring, joined by Fitzgerald, J.). The Internet survey was admitted in evidence during the testimony of Dr. Cohen, a credentialed survey expert, who validated the survey. Dr. Cohen testified that the Knowledge Networks survey was "proper" and represented "appropriate ways of gathering information from smokers via survey method." Dr. Dennis, who conducted the survey, is highly credentialed in survey research practices and was recognized by the trial court as a qualified and experienced expert in survey research.

On appeal, defendant has not challenged the trial court's qualification of Dr. Dennis as an expert, nor could it legitimately question his qualifications. At the time of the trial, defendant's own damage expert, Dr. Viscusi, was working with Dr. Dennis on a government-sponsored survey research project utilizing the Knowledge Networks survey methodology. Similarly, defendant's survey expert, Dr. Mathiowetz, had coauthored a learned treatise with Dr. Dennis concerning survey techniques.

Admittedly, Dr. Dennis was subjected to extensive cross-examination, and his conclusions were challenged by defendant's expert witness, Dr. Mathiowetz. Nonetheless, the record reveals no pretrial request for a *Frye* hearing on the issue of general acceptance of the Knowledge Networks survey methodology. See *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923). Although defendant moved to strike Dr. Dennis' testimony regarding the survey on foundation and *Donaldson* grounds, no challenge to the general acceptance of his survey methods was enunciated for the record. Thus, no coherent requisite challenge to the general acceptance of the survey method appears ei-

ther in the trial record or in defendant's briefs. *Frye* issues are reviewed under an abuse of discretion standard. *Donaldson v. Central Illinois Public Service Co.*, 199 Ill.2d 63, 76, 262 Ill.Dec. 854, 767 N.E.2d 314 (2002). Accordingly, there is no basis in the record to conclude the trial court abused its discretion in admitting the Knowledge Networks survey because of its authentication by credentialed witnesses and defendant's failure to lodge a sufficient challenge to the general acceptance of the survey method.

Thus, in addition to the points asserted by Justice Freeman, I conclude that neither section 10b(1), nor the admission of the Knowledge Network survey, provides a basis for reversing the trial court's judgment. Therefore, I respectfully dissent.

Justice FREEMAN joins in this dissent.

Dissent Upon Denial of Rehearing

Justice FREEMAN, dissenting:

Plaintiffs petitioned for rehearing in this case. Because I believe that this court's judgment may have been erroneous, I dissent from the denial of the petition for rehearing.

I

As a preliminary matter, plaintiffs correctly question the precedential value of this court's decision. Plaintiffs observe that no rationale in the December 15, 2005, judgment received a majority of votes. In other words, there was no holding by a majority opinion – except for the disposition of the cause, *i.e.*, four justices voted for reversal.

Justice Garman's opinion, holding that PMUSA's conduct was exempt under section 10b(1) of the Consumer Fraud Act (815 ILCS 505/10b(1) (West 1998)), was joined by Justice McMorrow. Justice Karmeier, joined by Justice Fitzgerald, did not specifically agree with Justice Garman's section 10b(1) holding. 219 Ill.2d at 275, 302 Ill.Dec. at 55, 848 N.E.2d at 55 (Karmeier, J., specially concurring, joined by Fitzgerald, J.) ("I agree that the judgment of the circuit court should be reversed. In my view, however, that conclusion is not dependent on the applicability of section 10b(1) of the Consumer Fraud Act"). "On this point, the language this court uses when it delivers a divided opinion can use some clarification. A 'special concurrence' is one where the authoring Justice joins both the opinion and the judgment. A 'concurrence' is one where the authoring Justice joins only the judgment of the court." *People v. Cruz*, 162 Ill.2d 314, 389 n.1, 205 Ill.Dec. 345, 643 N.E.2d 636 (1994) (Heiple, J., dissenting, joined by Bilandic, C.J.). In this case, Justice Karmeier expressly states: "I fully concur *in the result* reached by the majority." (Emphasis added.) 219 Ill.2d at 285, 302 Ill.Dec. at 60, 848 N.E.2d at 60 (Karmeier, J., specially concurring, joined by Fitzgerald, J.). Since Justice Karmeier does not join Justice Garman's opinion, his

opinion should not be designated a "special concurrence" but, rather, a "concurrence."

Justice Garman's opinion in this case did not receive the assent of four justices. Therefore, it cannot constitute "the opinion of the court." Rather, Justice Garman delivered the judgment of the court in an opinion that presents the views of only a plurality of this court. "The only thing four justices agree on today is that reversal is necessary. In terms of precedent, none of the opinions filed in this case has the force of law." *Cruz*, 162 Ill.2d at 389 n.1, 205 Ill.Dec. 345, 643 N.E.2d 636 (Heiple, J., dissenting, joined by Bilandic, C.J.).

Perhaps the fact that the court's decision is not binding precedent is for the best. As this dissent upon denial of rehearing will establish, a majority of this court has not responded, in any way, to the critical points plaintiffs have raised during this rehearing period. Given the plurality's "erroneous and irresponsible interpretation of our Consumer Fraud Act" (219 Ill.2d at 286, 302 Ill.Dec. at 61, 848 N.E.2d at 61 (Freeman, J., dissenting, joined by Kilbride, J.)), we do well to remember that Justice Garman's interpretation of our Consumer Fraud Act does not have the force of law and the issues that the opinion discusses remain open for a better-reasoned adjudication.

II

In their petition for rehearing, plaintiffs contend that Justice Garman's plurality opinion overlooked or misapplied four critical points. Plaintiffs first contend that the plurality failed to properly apply the canons of statutory construction and, accordingly, misinterpreted section 10b(1) of the Consumer Fraud Act (815 ILCS 505/10b(1) (West 1998)). Specifically, plaintiffs argue that Justice Garman's plurality opinion fails to apply section 11a of the Consumer Fraud Act, which requires a court to liberally construe the Act (815 ILCS 505/11a (West 1998)), and overlooks the canon of statutory construction that exceptions in a statute should be strictly construed (see

Mid-South Chemical Corp. v. Carpentier, 14 Ill.2d 514, 519, 153 N.E.2d 72 (1958) (and cases cited therein)).

Plaintiffs also contend that Justice Garman's plurality opinion misapplied the *de novo* standard of review, or mischaracterized the standard of review it actually utilized. Justice Garman's plurality opinion concluded that *de novo* review is appropriate because the actions of the FTC with respect to the use of the disputed descriptors are a matter of public record. Therefore, reasons the plurality, section 10b(1) is being applied to essentially undisputed facts. The plurality concludes that "we need not evaluate the credibility of witnesses or weigh conflicting testimony to determine whether the actions of the FTC have resulted in specific authorization of the use of these terms by cigarette manufacturers." 219 Ill.2d at 236, 302 Ill.Dec. at 34, 848 N.E.2d at 34 (Garman, J., joined by McMorrow, J.). However, plaintiffs argue that Justice Garman's plurality opinion did precisely this.[9]

Plaintiffs next contend that Justice Garman's plurality opinion relied heavily on the testimony of defendant's expert witness Dr. Peterman, yet at the same time ignores his testimony on cross-examination. Plaintiffs further argued that Justice Garman's plurality opinion overlooked PMUSA's "Petition for Rulemaking" filed with the FTC on September 18, 2002, which it submitted as an exhibit at trial. PMUSA's own trial witness, Nancy Lund, testified on direct examination that PMUSA filed this FTC petition for the following purpose:

> "There were kind of three areas where we asked for guidance. One was in the measurement itself, the

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[9] Justice Garman's plurality opinion relies heavily upon the testimony of defendant's expert witness Dr. Peterman. Viewing the totality of Dr. Peterman's testimony, both on direct and cross-examination, it is clear that the facts relating to the FTC's supposed "specific authorization" of the fraud in this case were highly disputed by the parties. Justice Garman's plurality opinion selectively weighs Dr. Peterman's testimony, crediting his testimony on direct examination and ignoring his testimony on cross-examination. Such action on review is inconsistent with a *de novo* standard of review.

> FTC method; one was about disclaimers about talking about what descriptions and low tar cigarette yields is actually all about; and the last one was some guidance on descriptors, such as lights and ultra lights."

Plaintiffs argue that with this FTC petition and Lund's corresponding trial testimony, PMUSA acknowledged in this litigation that, as of 2002, the FTC had never authorized PMUSA's use of the terms "lights" or "lowered tar and nicotine." Indeed, as plaintiffs reasoned in the petition for rehearing, if the FTC had previously authorized PMUSA to use the disputed descriptors as part of the consent decrees it had entered into with other tobacco companies in 1971 and 1995, then there would have been no reason for PMUSA to petition the FTC for "guidance" and rulemaking on the use of these very same descriptors.

Plaintiffs also contend that the plurality acknowledged PMUSA's intentional fraud. 219 Ill.2d at 208-09, 302 Ill.Dec. at 19-20, 848 N.E.2d at 19-20 (Garman, J., joined by McMorrow, J.), 219 Ill.2d at 276, 302 Ill.Dec. at 55, 848 N.E.2d at 55 (Karmeier, J., specially concurring, joined by Fitzgerald, J.). However, according to plaintiffs, Justice Garman's plurality opinion erroneously concluded that the FTC "specifically authorized" such fraud. In reaching this erroneous conclusion, Justice Garman's plurality opinion misinterprets the scope of FTC voluntary consent orders, in direct conflict with federal precedent. Consent orders are binding only upon the named parties and represent a settlement in which neither side has insisted upon an adjudication on the merits. FTC consent orders represent a compromise between the parties to the consent order and no precedential weight is given to such a consent order for purposes of FTC enforcement proceedings against another party. Plaintiffs inform this court that we have no authority under state law, *i.e.*, the Consumer Fraud Act or the Deceptive Practices Act, to expand the scope and meaning of an FTC consent order. As plaintiffs inform us, "federal law is clear that a consent

order involving other parties cannot serve as authorization or permission for a different industry participant to engage in the same conduct – let alone conduct that is not covered by the prior consent order." Plaintiffs insist that the 1971 and 1995 consent orders "are no more than isolated voluntary agreements having nothing to do with PMUSA and the conduct at issue in this litigation."

Also, according to the petition for rehearing, Justice Garman's plurality opinion overlooks the fact that neither the 1971 nor the 1995 consent orders applied to PMUSA's misconduct and, in any event, PMUSA failed to comply with these orders.

Plaintiffs filed a supplement to their petition for rehearing, which focuses on their contention that Justice Garman's plurality opinion misinterprets the scope of FTC voluntary consent orders. Plaintiffs inform us that the FTC itself has plainly held that a "consent agreement [with one party] is binding only between the Commission and [that party]." *Trans Union Corp.*, 118 F.T.C. 821, 864 n.18, 1994 WL 16011111 (1994), *aff'd*, 245 F.3d 809 (D.C.Cir.2001). Thus, according to plaintiffs, an FTC voluntary consent order cannot be used as a shield by a third party.

Indeed, plaintiff further informs us that the 1971 consent order, upon which Justice Garman's plurality opinion relies, was terminated by FTC rule between the FTC and the actual party to that voluntary agreement – American Brands. According to plaintiffs: "Therefore, it is not possible for this Court to rely upon this terminated order with a different party concerning different conduct as 'specific authorization' for Philip Morris to engage in the intentional fraud at issue in this litigation."

These contentions are significant and persuade me to vote for rehearing.

III

In plaintiffs' supplement to their petition for rehearing, pursuing their contention regarding the misinterpretation

of the FTC voluntary consent orders, plaintiffs: (A) invoke the doctrine of primary jurisdiction, and (B) suggest a means by which this court could implement the doctrine.

A

"Despite the name, the doctrine of primary jurisdiction does not involve jurisdictional questions. It is a common law doctrine used to coordinate administrative and judicial decisionmaking." *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir.1988). "Nor can it be questioned that the doctrine applies to the states." *Agricultural Services Ass'n v. Commonwealth*, 210 Va. 506, 509, 171 S.E.2d 840, 843 (1970); accord *Segers v. Industrial Comm'n*, 191 Ill.2d 421, 428, 247 Ill.Dec. 433, 732 N.E.2d 488 (2000) ("noting doctrine of primary jurisdiction is not technically a question of jurisdiction at all but rather a question of judicial self-restraint and relations between the courts and administrative agencies"), citing *Peoples Energy Corp. v. Illinois Commerce Comm'n*, 142 Ill.App.3d 917, 931, 97 Ill.Dec. 115, 492 N.E.2d 551 (1986); *Flo-Sun, Inc. v. Kirk*, 783 So.2d 1029, 1037-38 (Fla.2001) ("It is also important to note that the application of the doctrine of primary jurisdiction is a matter of deference, policy and comity, not subject matter jurisdiction"); *State v. United States Steel Corp.*, 307 Minn. 374, 380, 240 N.W.2d 316, 319 (1976) ("The judicially created doctrine of primary jurisdiction is concerned with the orderly and sensible coordination of the work of agencies and courts").

The doctrine of primary jurisdiction

> "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an admini rative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States v. Western Pacific R.R.*

> *Co.*, 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126, 132 (1956).

Accord *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68, 91 S.Ct. 203, 208, 27 L.Ed.2d 203, 209 (1970) ("When there is a basis for judicial action, independent of agency proceedings, courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved"); *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 444-45, 98 Ill.Dec. 24, 493 N.E.2d 1045 (1986). Courts recognized long ago that coordination between traditional judicial machinery and administrative agencies "was necessary if consistent and coherent policy were to emerge. [Citation.] The doctrine of primary jurisdiction has become one of the key judicial switches through which this current has passed." *Port of Boston*, 400 U.S. at 68, 91 S.Ct. at 208, 27 L.Ed.2d at 208-09.

The rationale for the doctrine of primary jurisdiction has been described as follows:

> "'[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.'" *Weinberger v. Bentex Pharmaceuticals, Inc.*,

412 U.S. 645, 654, 93 S.Ct. 2488, 2494, 37 L.Ed.2d 235, 242 (1973), quoting *Far East Conference v. United States*, 342 U.S. 570, 574-75, 72 S.Ct. 492, 494, 96 L.Ed. 576, 582 (1952).

Accord *Western Pacific*, 352 U.S. at 64-65, 77 S.Ct. at 165, 1 L.Ed.2d at 132; *Kellerman*, 112 Ill.2d at 444-45, 98 Ill.Dec. 24, 493 N.E.2d 1045 (both cases quoting *Far East Conference*). There is no fixed formula for applying the doctrine of primary jurisdiction. In each case, the question is whether the reasons for the doctrine are present, and whether the purposes of the doctrine will be furthered by its application in the particular litigation. *Western Pacific*, 352 U.S. at 64, 77 S.Ct. at 165, 1 L.Ed.2d at 132.

In their supplement to their petition for rehearing, plaintiffs request that this court solicit the FTC's views on the issue of the 1971 and 1995 FTC voluntary consent orders. A majority of this court, however, apparently believes that this request should go unanswered with no response to the compelling legal arguments made in support of it. Unlike my colleagues, I believe that the plaintiffs in their supplemental petition for rehearing have raised legitimate questions about this court's decision and the denial of their request merits some form of discussion.

I note that plaintiffs have made this request for the first time, before this court, in their petition for rehearing. Consequently, we could deem this issue procedurally forfeited. See 188 Ill.2d R. 341(e)(7) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"). Indeed, since the doctrine of primary jurisdiction does not refer to the subject matter jurisdiction of a court, primary jurisdiction is an issue that can be waived or forfeited. *Gross Common Carrier, Inc. v. Baxter Healthcare Corp.*, 51 F.3d 703, 706 (7th Cir.1995); *Kendra Oil & Gas, Inc. v. Homco, Ltd.*, 879 F.2d 240, 242 (7th Cir.1989); *Segers*, 191 Ill.2d at 428, 247 Ill.Dec. 433, 732 N.E.2d 488; see, *e.g.*, *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366 n.10, 114 S.Ct. 855, 863 n.10, 127 L.Ed.2d 183, 195 n.10 (1994) (declining

to invoke, *sua sponte*, primary jurisdiction doctrine where parties failed to brief or argue it).

However, the waiver rule is a principle of administrative convenience, an admonition to the parties; it is not a jurisdictional requirement or any limitation upon the jurisdiction of a reviewing court. In this regard, this court has recognized that a reviewing court may, in furtherance of its responsibility to provide a just result and to maintain a sound and uniform body of precedent, override considerations of waiver that stem from the adversarial nature of our system. *In re C.R.H.*, 163 Ill.2d 263, 274, 206 Ill.Dec. 100, 644 N.E.2d 1153 (1994); *Hux v. Raben*, 38 Ill.2d 223, 224-25, 230 N.E.2d 831 (1967); accord 155 Ill.2d R. 366(a)(5). In this case, for the following reasons, this responsibility outweighs plaintiffs' procedural default. See, *e.g.*, *Dillon v. Evanston Hospital*, 199 Ill.2d 483, 504-05, 264 Ill.Dec. 653, 771 N.E.2d 357 (2002) (and cases cited therein).

As our rule of procedural default is a principle of administrative convenience for the courts, similarly, the doctrine of primary jurisdiction "exists for the proper distribution of power between judicial and administrative bodies and not for the convenience of the parties." *Distrigas of Massachusetts Corp. v. Boston Gas Co.*, 693 F.2d 1113, 1117 (1st Cir.1982). Accordingly, a court may examine, *sua sponte*, whether the doctrine applies. For example, in *Western Pacific*, 352 U.S. at 63, 77 S.Ct. at 165, 1 L.Ed.2d at 131-32, the United States Supreme Court felt obliged to address the issue of primary jurisdiction, although neither party had challenged that aspect of the lower court's rulings. Indeed, "courts often invoke the doctrine on their own motion." *Fontan-de-Maldonado v. Lineas Aereas Costarricenses, S.A.*, 936 F.2d 630, 632 (1st Cir.1991) (collecting cases); see also *Syntek Semiconductor Co. v. Microchip Technology Inc.*, 307 F.3d 775, 780 n.2 (9th Cir.2002) ("Although the parties did not raise the question of primary jurisdiction, we may do so *sua sponte*"); *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491,

1496 (10th Cir.1996) (same); *Red Lake Band*, 846 F.2d at 475-76 (addressing primary jurisdiction issue raised for first time in petition for rehearing); *Baltimore & Ohio Chicago Terminal R.R. Co. v. Wisconsin Central Ltd.*, 154 F.3d 404, 411 (7th Cir.1998) (acknowledging that court "would relieve the parties of their waiver" if primary jurisdiction doctrine were "of transcendent importance" to administration of statute); *Gross Common Carrier*, 51 F.3d at 706 n.3 (noting that a court's failure to address the doctrine may, in some cases, constitute plain error).

Another recent example is found in *Cole v. U.S. Capital, Inc.*, 389 F.3d 719 (7th Cir.2004). After oral argument in *Cole*, the United States Court of Appeals for the Seventh Circuit invited the FTC to file an *amicus curiae* brief to inform the court of the agency's views. *Cole*, 389 F.3d at 722 n.2. The court of appeals apparently raised this issue *sua sponte* and was not concerned with any notion of procedural default.

Given the foregoing, I do not believe that plaintiffs' procedural default would serve as a bar to this court's granting of its request to address the doctrine of primary jurisdiction. Turning to the merits of plaintiffs' arguments, I agree with plaintiffs that the doctrine applies in the present case. It is clear that the reasons for the doctrine are present. Justice Garman's plurality opinion purports to resolve this case by construing and applying section 10b(1) of the Consumer Fraud Act (815 ILCS 505/10b(1) (West 2000)). The opinion attempts the following explanation:

> "Operation of section 10b(1) is not dependent on the intent of Congress. Rather, it is dependent on the intent of the Illinois General Assembly to allow regulated entities to engage in commercial conduct that might otherwise be alleged to be fraudulent or deceptive without risk of civil liability, so long as that content is specifically authorized by the regulatory body." 219 Ill.2d at 274, 302 Ill.Dec. at 54, 848 N.E.2d at 54.

This is precisely the context for application of the primary jurisdiction doctrine. The application of section 10b(1) of the Consumer Fraud Act depends on whether the alleged conduct of PMUSA was "specifically authorized" by the FTC. Plaintiffs' Consumer Fraud Act claim, originally cognizable in the circuit court, requires the resolution of an issue, *i.e.*, the existence and extent of the FTC's "specific authorization" of PMUSA's conduct, which lies within the special competence of the FTC. See *Western Pacific*, 352 U.S. at 64, 77 S.Ct. at 165, 1 L.Ed.2d at 132.

The purposes of the doctrine will be furthered by its application in this case. The purposes of the primary jurisdiction doctrine are to: (1) ensure desirable uniformity in the determination of certain types of administrative questions, and (2) promote resort to administrative agency experience and expertise where the court is presented with a question outside its conventional experience. *Western Pacific R.R.*, 352 U.S. at 64, 77 S.Ct. at 165, 1 L.Ed.2d at 132. The furtherance of these purposes is more than sufficient to override the effect of plaintiffs' procedural default. See, *e.g.*, *Dillon*, 199 Ill.2d at 504-05, 264 Ill.Dec. 653, 771 N.E.2d 357.

In the present case, Illinois courts necessarily have become embroiled in the technical aspects of FTC voluntary consent orders to determine if the FTC "specifically authorized" PMUSA's conduct. Plaintiffs seek referral to the FTC of the question whether the terms of the FTC voluntary consent orders, involving American Brands and American Tobacco, specifically authorized representations by PMUSA, which was not a party to those consent orders. Referral in this case would obviously promote uniformity in the determination of this crucial issue and would correctly acknowledge the FTC's experience and expertise in the function and interpretation of FTC voluntary consent orders. See, *e.g.*, *In re StarNet, Inc.*, 355 F.3d 634, 639 (7th Cir.2004) ("Instead of trying to divine how the FCC would resolve the ambiguity * * * we think it best to send this matter to the Commission under the doc-

trine of primary jurisdiction"); *Access Telecommunications v. Southwestern Bell Telephone Co.*, 137 F.3d 605, 609 (8th Cir.1998) (finding that determination of dispositive issue would necessarily embroil court in technical aspects of FCC matter, and that the "FCC has far more expertise than the courts" concerning administrative matter; concluding that "the need to draw upon the FCC's expertise and experience" was present).

If, as Justice Garman's plurality opinion contends, the FTC has been actively concerned with the complex policy issues that cigarette advertising presents, then prudential judicial restraint should counsel referral of this specific dispositive issue to the specialized agency that Congress intended to deal with this issue – the FTC. See generally *Hansen v. Norfolk & Western Ry. Co.*, 689 F.2d 707 (7th Cir.1982). The FTC should first address this issue to avoid the possibility of a multitude of interpretations by several states of the same FTC voluntary consent orders, and to achieve a uniform administration of FTC policy. See *Agricultural Services Ass'n*, 210 Va. at 509, 171 S.E.2d at 842- 43, quoting *Service Storage & Transfer Co. v. Commonwealth of Virginia*, 359 U.S. 171, 179, 79 S.Ct. 714, 719, 3 L.Ed.2d 717, 722 (1959).

Indeed, a question of how to interpret an administrative agency order is the sort of determination "classically committed to agency discretion under the doctrine of primary jurisdiction." *Zapp v. United Transportation Union*, 727 F.2d 617, 625 (7th Cir.1984). The denial of plaintiffs' referral request appears to constitute a rejection of "orderly and sensible coordination of the work of agencies and courts" (*United States Steel*, 307 Minn. at 380, 240 N.W.2d at 319), and indicates that this court is insensitive to the emergence of "consistent and coherent policy." *Port of Boston*, 400 U.S. at 68, 91 S.Ct. at 208, 27 L.Ed.2d at 208.

B

Plaintiffs suggest that this court can implement referral by soliciting the FTC to submit an *amicus curiae* brief. I agree with plaintiffs that the FTC, through an *amicus* brief, can speak definitively to the issues without undue delay. The only question this court would primarily ask the FTC is simply what it intended to do when it entered into the 1971 and 1995 voluntary consent orders. I believe that "this question can be answered fully and quickly through amicus participation. If more elaborate agency proceedings are required, the agency can so inform us." *Distrigas*, 693 F.2d at 1119. Further, the FTC regularly accommodates referral requests. Indeed, a visit to the agency's Web site, www.ftc.gov, leads to an on-line sample of their *amicus* briefs.

My research has revealed two common examples of referral requests: one general and one more specific.

An example of a general referral is found in *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 722 n.2 (7th Cir.2004):

> "After oral argument, the court invited the Federal Trade Commission ('FTC'), the agency charged with administering the FCRA [Fair Credit Reporting Act], to file a brief as amicus curiae. The FTC accepted the court's invitation, and the court expresses its thanks to the FTC for the assistance that it has rendered."

The Seventh Circuit's invitation took the form of the following order issued through the court's clerk's office:

> "Because this case presents issues that will have a significant effect on the enforcement of the Fair Credit Reporting Act, the court invites the Federal Trade Commission to file a brief as amicus curiae. If the Commission accepts our invitation, the brief should be filed within 45 days of this order. The brief should not exceed 30 pages.
>
> The court would also appreciate the Commission's informing the court, as soon as practicable, as to

whether it plans to file such a brief. This notification can be effected through a letter to the Clerk.

If the Commission accepts the court's invitation, the parties may file supplemental reply briefs addressing matters presented in the Commission's brief. Any such reply brief should not exceed 20 pages in length and shall be filed within 20 days of the filing of the Commission's brief with this court."

As the court acknowledged in its opinion, the FTC accommodated the court with an *amicus* brief, which aided the court in reaching its decision.

Another example of a general request is found in *Distrigas*, where the First Circuit Court of Appeals concluded its original opinion as follows:

"We therefore shall hold this case on the docket, while instructing the clerk to send a copy of this opinion to the Solicitor General along with this court's request that FERC [Federal Energy Regulatory Commission] file an amicus brief. The parties may file responses to FERC's brief. This court will then take such further action as is appropriate." *Distrigas*, 693 F.2d at 1119.

The next section of the opinion, captioned "MEMORANDUM AND ORDER," acknowledged receipt of the agency's *amicus* brief, and disposed of the case. *Distrigas*, 693 F.2d at 1119.

In contrast to a court's general request for an *amicus* brief, the form of the request can be very specific, resembling a certified question. For example, in *Phillips v. AWH Corp.*, 376 F.3d 1382 (Fed.Cir.2004), the United States Court of Appeals for the Federal Circuit denied the petition for rehearing, but allowed rehearing *en banc*. The court invited *amicus* briefs from several administrative agencies, including the FTC, to address seven specific questions. *Phillips*, 376 F.3d at 1383. The FTC joined in an *amicus* brief and the court ultimately decided the case. *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed.Cir.2005).

With respect to the present case, I would have allowed plaintiffs' petition for rehearing. I also would have requested the FTC to file an *amicus* brief in order to address specifically the following question: Did the FTC specifically authorize Philip Morris' conduct (*i.e.*, the use of the terms "Lights" or "Lowered Tar and Nicotine" on the packages of Marlboro Lights or Cambridge Lights from October 1973 through February 8, 2001) through any of the following FTC actions:

(1) the 1971 consent order between the FTC and American Brands, Inc.;

(2) the 1995 consent order between the FTC and American Tobacco Company; and/or

(3) the 1970 voluntary agreement?

Further, was Philip Morris' use of "Lights" and/or "Lowered Tar and Nicotine" on the packages of Marlboro Lights or Cambridge Light cigarettes, governed by and thereby "in compliance" with the 1971 and 1995 consent orders?

Further, had the FTC accepted the invitation, I would have held this case on our docket until we could have decided this appeal with the benefit of the FTC's experience and expertise.

IV

Plaintiffs raise significant points which this court has overlooked or misapprehended. Plaintiffs also suggest a reasonable and generally accepted means by which this court can obtain the FTC's view of that agency's own consent orders. The adoption of this approach would obviously be of great benefit to this court in the present appeal. Further, such a basic request addressed to the FTC would indicate that this court: (1) is cognizant of the need for uniformity in the determination of administrative issues such as this, and (2) is sensitive to the need for prudential judicial restraint. Regrettably, however, the court appears more concerned with finality than reaching the most informed decision possible based on highly pertinent

– if not dispositive – information from the very federal agency whose consent orders are at the heart of Justice Garman's analysis. The court's denial of the petition for rehearing does not speak well of this court. It is disappointing, and will ultimately prove to be embarrassing. History will be the judge.

For the foregoing reasons, I dissent from the court's denial of the petition for rehearing.

Justice KILBRIDE joins in this dissent.

CIRCUIT COURT OF ILLINOIS
MADISON COUNTY

No. 00-L-112

SHARON PRICE AND MICHAEL FRUTH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

PHILIP MORRIS INCORPORATED,
Defendant.

[Mar. 21, 2003]

JUDGMENT

BYRON, J.

1. Plaintiffs, Sharon Price and Michael Fruth, on behalf of themselves and all others similarly situated, have brought this action as a Class Action against Defendant Philip Morris Incorporated ("Philip Morris") pursuant to § 5/2-801 *et seq.* of the Illinois Code of Civil Procedure, individually and on behalf of a Class consisting of persons who purchased Defendant's Marlboro Lights and Cambridge Lights cigarettes in the State of Illinois for personal consumption. Specifically, the Court finds that the Class is defined as follows:

> All persons who purchased Defendant's Cambridge Lights and Marlboro Lights cigarettes in Illinois for personal consumption, between the first date the Defendant placed its Cambridge Lights and Marlboro Lights cigarettes into the stream of commerce through February 8, 2001.
>
> Excluded from the Class is Defendant, any parent, subsidiary, affiliate, or controlled person of Defen-

dant, as well as the officers, directors, agents, servants, or employees of Defendant, and the immediate family members of such persons. Also excluded is any trial judge who may preside over this case.

2. This Class Action is brought pursuant to the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* ("Illinois Consumer Fraud Act"). Based upon the findings and conclusions herein, the Court finds that Defendant Philip Morris has violated the Illinois Consumer Fraud Act (815 ILCS § 505/2) and the Uniform Deceptive Trade Practices Act (815 ILCS § 510/2). As a direct and proximate result of Defendant's violation of these statutes, Plaintiffs and the Class have suffered compensatory damages in the amount of $7.1005 Billion.

3. The trial in this case commenced on January 21, 2003 and continued through March 6, 2003. The findings contained within this Order are based upon the trial testimony in this action and evidence admitted during trial.

4. This Court has presided over this action since its inception and is familiar with the issues of fact and law it presents. The Court has heard, read and considered all of the admitted evidence and testimony pertinent to the Consumer Fraud Act Claims at issue in this case. The Court has had the opportunity to consider the documents and materials admitted into evidence and to observe the demeanor, evaluate the credibility and weigh the testimony of the parties' fact and opinion witnesses and the arguments of counsel.

5. The Court, after considering all of the evidence, the demeanor and the credibility of the witnesses, makes the overall observation that the expert and fact witnesses who testified for the Plaintiffs in this case were credible and reputable. Specifically, many of the experts who offered opinions on behalf of the Plaintiffs in this case are leaders in their scientific fields, and national leaders of the public health community. The Court did not find the expert and fact testimony of Philip Morris' witnesses to be as credible

as the testimony of witnesses for the Plaintiffs in this case.

6. During the course of this trial, the Court allowed both parties latitude with respect to their offer of expert testimony based upon their disclosures of opinion testimony under Illinois Supreme Court Rule 213. Both parties were permitted to offer opinion testimony over opposing counsel's objection in this regard. Although the Court allowed this evidence into the record, the Court finds (as a matter of fact) that my rulings in this case would be unchanged in any respect in the event the Court had disallowed the opinion testimony that was objected to by either party on the basis of alleged inadequate Rule 213 disclosure.

7. The Court finds that it has jurisdiction over the subject matter of this action and the parties hereto pursuant to 735 ILCS 5/2-209 and that venue is proper in this Court pursuant to 735 ILCS 5/2-101.

8. The Court finds that Defendant engaged in the business of manufacturing, promoting, marketing, distributing and selling Marlboro Lights and Cambridge Lights cigarettes in Illinois and in Madison County specifically.

9. The Court finds that Defendant promoted, marketed, distributed and sold Marlboro Lights cigarettes in Illinois from 1971 through the end of the Class Period in this case – February 8, 2001 – and promoted, marketed, distributed and sold Cambridge Lights cigarettes in Illinois from 1986 through the end of the Class Period in this case.

10. Based upon the facts, testimony and evidence presented at trial, the Court first revisits its prior Certification Order entered on February 8, 2001.

Under 735 ILCS 5/2-801, a Class may be certified under Illinois Law if:

1. the Class is so numerous that joinder of all members is impracticable;

2. there are questions of fact or law common to the Class, which common question predominate over any questions affecting only individual members;

3. the representative parties will fairly and adequately protect the interests of the Class; and,

4. the Class Action is an appropriate method for the fair and efficient adjudication of the controversy.

The Court finds that each of the prerequisites for the maintenance of a Class Action has been met.

11. With respect to numerosity, the Court finds Plaintiff have met their burden that the Class in this case includes over one million members and finds, based on the evidence introduced, that this Class is so numerous that joinder of all members is not only impracticable but virtually impossible. In addition, individual actions by each Class member would be impracticable.

12. Based upon the evidence introduced at trial, commonality has been demonstrated, because the claims of all Class members are based upon both common questions of law and fact which predominate over any questions affecting individual Class members. *Miner v. Gillette Co.*, 87 Ill.2d 7 (1981). Philip Morris has engaged in a course of conduct that affects this Class in such a way that all members share various elements of this cause of action.

13. The common issues of law predominate because the Illinois Consumer Fraud Act applies to the claims of all Class members.

14. In addition, the Court finds, based upon the evidence introduced at trial, that the following common issues applicable to the entire Class:

a. whether Class members understood the descriptor "lights" and "lowered tar and nicotine" to mean less harmful, safer and/or delivering less tar;

b. whether these representations were false and/or misleading to Class members;

c. whether Defendant Philip Morris intended for the Class to rely upon these representations;

c. whether Philip Morris' conduct violated the Illinois Commerce Fraud Act and whether this violation was willful and wanton; and

d. whether Class members sustained damages as a result of Philip Morris' deceptive conduct.

15. Based upon the testimony of the representative parties – Sharon Price and Michael Fruth – offered during the trial of this action as well as these Class Representatives' attendance and participation in the trial of this matter, the Court finds that these representative parties have claims which are typical of claims of the Class members, that there is a substantial alignment between their interests and the interests of the Class in prosecuting this action, and that they have indeed fairly and adequately protected the interest of the Class.

16. Based upon the trial in this matter, the Court finds that the law firm of Carr Korein Tillery was and is competent Class Counsel and adequately represents the interests of the Class in this action.

17. Based upon the evidence introduced at trial, a Class Action is not only the appropriate method for the fair and efficient adjudication of this controversy but is the only practicable method for such adjudication.

18. The claims certified in this Class Action do not include claims for personal injury but only encompass claims under the Illinois Consumer Fraud Act for economic losses based upon the purchase of Marlboro Lights and Cambridge Lights cigarettes in Illinois during the Class Period. In rendering this Order and the Judgment thereon, this Court expressly reserves the right of all Class members to bring personal injury claims.

19. Based upon these findings, the Court hereby reaffirms its Order dated February 1, 2001 (entered February 8, 2001) granting Plaintiffs' Motion for Class Certification.

20. The elements of Plaintiffs' claim under the Illinois Consumer Fraud Act are as follows:

a. a deceptive act or practice by Philip Morris;

b. Philip Morris' intent that the Plaintiffs rely on the deception;

c. the occurrence of the deception in the course of conduct involving trade or commerce; and,

d. actual damage to the Plaintiffs;

e. proximately caused by the deception.

See *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134 (2002).

21. With respect to Marlboro Lights, two specific representations are at issue: (1) the descriptor "Lights" in the name and (2) the "Lowered Tar and Nicotine" representation. Both of these representations appeared on every pack of Marlboro Lights sold in Illinois from 1971 through the end of the Class Period.

22. With respect to Cambridge Lights, the representation at issue is the descriptor "Lights" in the brand name. This descriptor appeared on every package of Cambridge Lights from 1986 through the end of this Class Period.

23. The representations at issue in this case are alleged by Plaintiffs to have violated the Illinois Consumer Fraud Act in two distinct ways. First, Plaintiffs allege that the representations of "Lights" and "Lowered Tar and Nicotine" are material and false. Second, Plaintiffs allege that the representation of lower tar explicitly contained within "Lowered Tar and Nicotine" representation and implicitly communicated by the descriptor "Lights" is false and misleading because members of the Class did not receive lower tar and nicotine and, even if some few members of the Class did receive some small reduction in tar, this representation is still fraudulent and misleading because it does not state matters which materially qualify the statement as made.

24. The matters not stated are that the "tar" from Marlboro Lights and Cambridge Lights cigarettes is

higher in toxic substances and more mutagenic than the tar from regular Marlboro and Cambridge cigarettes. Therefore, even if it were possible that for some Class members the representation of "lowered tar" were true, the representation (without the material qualification that the delivered tar is more harmful) is fraudulent.

25. The misrepresentations at issue in this case (and Philip Morris' fraudulent conduct (related thereto) are alleged by Plaintiffs also to violate the Illinois Consumer Fraud Act and the Illinois Uniform Deceptive Trade Practices Act, because Philip Morris' course of conduct related to these fraudulent misrepresentations is "unfair". The elements of an unfairness claim under the Illinois Uniform Deceptive Trade Practices Act, are: (1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive or unscrupulous; and (3) whether it causes substantial injury to consumers.

26. There is no dispute that if the other elements of this cause are met, Philip Morris' deception occurred in the course of conduct involving trade or commerce. Philip Morris admits that it manufactured, promoted, marketed, distributed and sold Marlboro Lights and Cambridge Lights cigarettes in Illinois and that this conduct involves trade or commerce.

The remaining disputed elements of Plaintiffs' claims are discussed individually below.

27. With respect to the definition of a "deceptive act" under the Act, 815 ILCS 501/1 *et seq.* provides in pertinent part:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression, or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practices described in Section 2 of the 'Uniform Deceptive Trade

Practices Act', approved August 6, 1965, in conduct of any trade or commerce are hereby declared unlawful; whether any person has in fact been mislead, deceived, or damaged thereby.

28. Plaintiffs offered credible testimonial and documentary evidence to establish that prior to the release of Marlboro Lights and Cambridge Lights, Philip Morris recognized that smokers had become increasingly concerned about the health issues related to smoking beginning in the 1950's. Specifically, Dr. Joel Cohen, a Professor at the University of Florida who has studied consumer behavior (specifically in the context of tobacco) for over twenty years, established as a factual matter that Philip Morris fully understood (prior to the launch of Marlboro Lights and Cambridge Lights) smokers' concerns regarding the negative health impact of smoking.

29. The testimony and documents offered at trial demonstrate that Philip Morris' initial response to this growing health concern was to create a disinformation environment wherein Philip Morris through its own public statements (and through its participation in the Tobacco Institute) knowingly and falsely disputed scientific conclusions that established a connection between smoking and diseases. Philip Morris' strategy was to create doubt about the negative health implications of smoking without actually denying these allegations. The evidence offered at trial establishes that Philip Morris continued this disinformation campaign through the mid-1990's.

30. Dr. Cohen and several other witnesses who testified in this case also offered credible testimony (based in part upon internal Philip Morris documents) that Philip Morris intentionally marketed Marlboro Lights with the descriptor "Lights" and the representation "Lowered Tar and Nicotine" on every package of Marlboro Lights with the intention of communicating to consumers that the Marlboro Lights cigarette was less harmful or safer than a regular Marlboro cigarette.

31. The Court finds, based upon the evidence introduced at trial, that Marlboro Lights and Cambridge Lights were introduced into the market by Philip Morris with the intent to provide smokers who were concerned about their health with a product that could reduce the cognitive dissonance associated with smoking and thereby allow them to continue to smoke cigarettes.

32. The Court finds, based upon the evidence introduced at trial, that Philip Morris' implicit health representations embodied by the descriptor "Lights" – although clearly understood by all Class members in this case – were not explicit, because Philip Morris (while at the same time intentionally and falsely misrepresenting these cigarette products as less harmful or less hazardous than their regular counterparts) was engaged in a disinformation campaign whereby it disputed that any cigarette was harmful or hazardous. As a consequence, Philip Morris chose to make implicit health claims for these products rather than explicit claims so as not to contradict its separate and contemporaneous disinformation efforts directed to the smoking public.

33. The internal Philip Morris documents and testimony introduced as evidence at trial conclusively demonstrate that, as a factual matter, Philip Morris intended to deceive consumers into believing that Marlboro Lights and Cambridge Lights cigarettes were less harmful or safer than their regular counterparts.

34. This Court finds that based upon the expert testimony and documentary evidence introduced at trial, the positive health attribute associated with Marlboro Lights and Cambridge Lights created by Philip Morris' misrepresentations constitutes a universally positive and desirable product attribute for the Class members in this case in the form of a health reassurance.

35. Marlboro Lights and Cambridge Lights were health reassurance cigarettes in that they expressly and impliedly conveyed the notion of a positive health attribute through the representations of "Lights" (with respect

to Marlboro Lights and Cambridge Lights) and the representation of 'Lowered Tar and Nicotine" (with respect to Marlboro Lights).

36. The Court finds that the term "Lights" not only conveyed a message of reduced harm and safety, but also conveyed to Class members that the "Lights" cigarette product was lower in tar and nicotine.

37. The Court finds that the representation of "Lowered Tar and Nicotine" on the package of Marlboro Lights not only conveyed the message to all consumers that Marlboro Lights possessed a positive health attribute as compared to a regular Marlboro, but also explicitly communicated that the Marlboro Lights cigarette would deliver less tar and nicotine to the consumer than a regular Marlboro.

38. Although Philip Morris' misrepresentations in this case were not in the form of an explicit statement that Marlboro Lights and Cambridge Lights were healthier or safer, the Court finds that Class members universally understood the message of reduced risk from these products.

39. Based upon the information environment existing at the time of the launch of Marlboro Lights and existing throughout the Class Period, the phrase "Lowered Tar and Nicotine" inescapably communicates that the Marlboro Lights cigarette is safer. The evidence at trial demonstrates that all consumers who chose a Marlboro Lights cigarette understood that tar and nicotine were the "bad" components in cigarette smoke and, therefore, lower levels of these components would reduce negative health affects of the cigarette product.

40. Although Philip Morris introduced evidence at trial in an attempt to contradict the universal reliance by Class members on the health representations implicit and explicit in the descriptors "Lights" and "Lowered Tar and Nicotine", this evidence does not persuade the Court. If anything, this evidence only demonstrates that Class members may have relied to different degrees or in different ways upon these health representations. In all

events, however, the testimony at trial demonstrates that all Class members in this case understood the positive health attribute associated with "Lights" on both the Marlboro Lights and Cambridge Lights package and "Lowered Tar and Nicotine" on the Marlboro Lights package. The testimony and evidence also establishes that this understanding was relied upon as a causative or determining factor for all Class members even if the degree or extent may have varied between Class members.

41. Class members' belief that Marlboro Lights and Cambridge Lights cigarettes were healthier than their regular counterparts was reinforced by the feel or impact of the smoke from these cigarettes in a person's mouth, throat and lungs. Although Philip Morris contends that some smokers preferred the taste of Marlboro Lights and Cambridge Lights, the evidence indicates that this preference was actually an additional health reassurance enforcement.

42. Plaintiffs also offered the credible expert testimony of Robert Cialdini, a Professor of Psychology with special expertise in human behavior, social influence and persuasion focusing specifically on persuasion and influence in the consumer context. Dr. Cialdini testified that the words "Lights" and "Lowered Tar and Nicotine" on the cigarette products at issue in this case meant "less hazardous" to all Class members. Dr. Cialdini also explained the various psychological principles influencing Class members' purchase decision in this case.

43. Dr. Cialdini credibly testified that the four Principles of Influence: association, consistency, authority and social proof, all reinforced and reaffirmed the association of these Light cigarettes with improved health. As a consequence of these Principles of Influence, Dr. Cialdini concluded that improved health was at least one of the determinative reasons for every Class Member to purchase either Marlboro Lights or Cambridge Lights during the Class Period (with the possible exception of individuals with an irrational death wish).

44. In addition to the internal Philip Morris documents that demonstrate Philip Morris' specific intent to market Marlboro Lights and Cambridge Lights as healthier and less harmful cigarette products, many of the current and former marketing executives at Philip Morris also testified that these products were, indeed, intentionally marketed to the health conscious consumer with the intent that consumers rely upon the implicit representation of safety. This testimony includes, but is not limited to, statements of intent from the decision-makers at Philip Morris at the time of the launch of Marlboro Lights and internal Philip Morris documents demonstrating such intent.

45. The Court finds the testimony and argument presented by Philip Morris that these Light cigarettes were at least in part marketed based upon taste characteristics as not credible and unconvincing. Evidence, including testimony from Philip Morris' own personnel, was introduced at trial that at the time of the launch of Marlboro Lights, Philip Morris and the advertising agency responsible for marketing Marlboro Lights understood the taste of Marlboro Lights to be a negative product attribute that needed to be overcome by the implicit health representation.

46. As Defendant has correctly pointed out, the individual Class members who testified in this case started smoking at different ages, smoked different amounts, and varied in other respects in their smoking behavior. In my view, this would certainly be expected. However, some very important common facts came out in the testimony of all Class members: while acknowledging that all cigarettes are unsafe, they all believed that buying and smoking a Light cigarette would be a safer or healthier alternative to a regular cigarette. All Class members who were asked the question thought that the words "Lowered Tar and Nicotine" meant just that – that they were getting less tar and nicotine when they smoked Marlboro Lights than they would get from a regular Marlboro. Most im-

portantly, they all testified that their belief that Marlboro Lights (or Cambridge Lights) were safer or healthier or contained less of the "bad stuff" than the regular cigarette counterparts resulted from their being denominated "lights" and contributed to their decision to buy Marlboro Lights and Cambridge Lights cigarettes.

47. The testimony of Defendant's expert, Dr. Timothy Meyer, that people may smoke for a variety of reasons and may also choose Lights cigarettes for a variety of reasons misses the crux of Plaintiffs' case and is, therefore, unpersuasive. As a threshold matter, the mere existence of potential other reasons for a consumer to prefer the products at issue in this case does not vitiate or eliminate the fraud associated with the health representation as a causative influence on all Class members' purchase decisions. "A person is liable for his or her conduct whether it contributed wholly or partly to the plaintiffs' injury as long as it was one of the proximate causes of the injury." *Leonardi v. Loyola of Chicago*, 168 Ill.2d 83, 658 N.E.2d 450, 455 (1995).

48. Dr. Meyer testified that the belief that Marlboro Lights and Cambridge Lights are safer was not a factor in the cigarette choice of all Class members because the health hazards of smoking are irrelevant to some smokers and some young smokers are actually attracted to the health hazard of smoking. The Court finds it altogether implausible that any smokers who have no concerns about the hazards of smoking or who actually want to defy death by smoking the most hazardous cigarettes available would choose specifically to smoke a low tar cigarette like Marlboro Lights and Cambridge Lights. Indeed, in making these assertions, Dr. Meyer had no empirical or other data specifically with respect to Marlboro Lights or Cambridge Lights and he had failed to avail himself of any of the relevant internal studies and documentation accumulated by the Defendant on whose behalf he was testifying.

49. The Court has listened to Plaintiffs and Class members testify about a broad range of issues concerning

their smoking of Marlboro Lights and Cambridge Lights cigarettes. The Court notes that during several of the discovery depositions which were shown in Court by stipulation as evidence, a number of issues arose concerning privileged communications with medical doctors as well as medical conditions. However, at no time was the Court asked by Defendant to resolve those issues by ruling on such assertions in the discovery phase of the case or during the trial when such testimony was presented. Considering those depositions in totality, any such evidence as to Class members' medical conditions or communications with physicians would have no influence on my determination of the issues in this case – and did not have any influence in fact.

50. Based upon the testimony and evidence introduced at trial, the Court finds that the term "Lights" and the phrase "Lowered Tar and Nicotine" universally communicated a reduced harm message to all Class members in this case and that all Class members relied upon this representation as at least one of the determining factors for their purchase decision.

51. Philip Morris offered survey evidence in an attempt to establish that only a portion of the Class was deceived by the misrepresentations of "Lights" and "Lowered Tar and Nicotine". On rebuttal, Plaintiffs offered the testimony of Dr. Stanley Presser to explain the significance and meaning of the survey data offered by Philip Morris.

52. The Court finds Dr. Stanley Presser to be one of the preeminent survey researchers and methodologists in this country and the court finds his testimony to be credible. Dr. Presser explained that none of the survey data presented by Philip Morris was informative of the question as to what percentage of Light smokers believed Light cigarettes were safer. In addition, none of the survey data offered by Philip Morris is informative of the question relating to what percentage of Light smokers purchased Light cigarettes for health or safety-related reasons. Dr. Presser explained that most of these surveys

measured the wrong population. The surveys relied upon by Philip Morris included both non-smokers and smokers of cigarette products other than Lights cigarettes. Therefore, the survey data was not representative of any percentage of Light smokers specifically. Other survey data offered by Philip Morris asked questions not related in any way to the critical questions at issue in this case.

53. Based upon the comparative credibility and persuasiveness of the evidence and testimony presented by Philip Morris in opposition to Plaintiffs' testimony that all Class members understood "Lights" and "Lowered Tar and Nicotine" to mean safer and all Class members purchased their cigarettes based at least in part upon this representation, the Court finds Philip Morris' evidence and testimony to be neither credible nor persuasive on this issue.

54. Philip Morris argued at trial that these representations were not the only source of information regarding Marlboro Lights and Cambridge Lights being safer than their regular counterparts. Philip Morris specifically argued that the public health community as a whole, and specific components of the public health community (including the authors of the Reports of the Surgeon General and statements issued by the American Cancer Society) were the reasons some consumers believed these products to be safer. The Court finds this testimony and evidence neither credible nor persuasive as a defense to liability in this Action. As a threshold matter, the fact that the public health community recommended to those smokers who could not quit that a lower-delivery cigarette would reduce risk is not misleading. There is apparently no dispute that actual lower delivery of toxic substances may reduce harm. The fact that Marlboro Lights and Cambridge Lights did not reduce the actual delivery of harmful toxins does not convert the message from the public health community into a defense to Philip Morris' intentional fraudulent conduct.

55. Morever, a significant body of credible evidence was introduced at trial demonstrating that Philip Morris had specific scientific and cigarette design knowledge that the public health community did not possess related to Lights cigarettes generally as well as Marlboro Lights and Cambridge Lights cigarettes specifically. This demonstrates that although Philip Morris knew their Lights cigarettes were not safer, the public health community did not know this fact. The Court finds that Philip Morris took advantage of the message of the public health community in selling their cigarettes which delivered neither lower tar and nicotine, nor less harm to the Class members in this case.

56. The testimony from Dr. William Farone (a high ranking scientist within Philip Morris from 1976 through 1984), demonstrates credibly that Philip Morris knew Light cigarettes (and specifically Marlboro Lights and Cambridge Lights) did not reduce the delivery of tar or nicotine to the consumer compared to their regular counterparts and that these cigarettes were not designed to reduce actual delivery to smokers.

57. Philip Morris internal documents and the testimony offered at trial demonstrate that Philip Morris, prior to the launch of Marlboro Lights and Cambridge Lights, knew that smokers adjusted their smoking behavior through largely unconscious means so as to receive the same dose of nicotine and tar from a Light cigarette as from a regular cigarette. In fact, the testimony and evidence clearly establish that Marlboro Lights and Cambridge Lights were specifically designed in such a way as to reduce the machine-measured tar and nicotine delivery while at the same time allowing consumers to extract the same levels of tar and nicotine from these products as they would extract from their regular Marlboro and Cambridge counterparts.

58. The evidence establishes that the primary design distinction between Marlboro Lights and Cambridge Lights as compared to their regular counterparts is in-

creased ventilation. Ventilation is measured by Philip Morris as the percent of air that is drawn in through the filter to dilute the smoke of the cigarette when smoked. This design distinction of ventilation provides for a lower machine measurement of tar and nicotine for "Lights" cigarettes, while still allowing the consumer to receive the same delivery of tar and nicotine from the "Lights" and regular cigarettes.

59. Although Philip Morris offered factual testimony through Willie Houck as to Philip Morris' intent and purpose in designing Marlboro Lights, the Court finds this testimony to not be credible. At the time of the design of Marlboro Lights, Willie Houck was a sophomore in college attending night school. He was an extremely junior member of the filter design group and did not have responsibility or authority to design and create Marlboro Lights (which is the way his testimony was offered by Philip Morris). Furthermore, he admittedly had absolutely no involvement in marketing these cigarettes in any fashion, particularly as "Lights," or representing them to deliver "lowered tar and nicotine" on the packaging.

60. Plaintiffs offered testimony and documentary evidence credibly demonstrating that the representations of "Lights" and "Lowered Tar and Nicotine" were false for all Class members in this case. For example, Dr. Neal Benowitz testified that Class members who smoked Marlboro Lights and Cambridge Lights would receive the same amount of tar and nicotine from these products as they would receive from a regular Marlboro or a regular Cambridge respectively. Dr. Benowitz specifically concluded, based upon his extensive scientific research, that smokers of these Marlboro Lights and Cambridge Lights cigarettes engage in what is called compensatory smoking behavior so as to receive 100% of the tar and nicotine that would be received by this smoker from the regular counterpart cigarette.

61. Compensatory smoking behavior consists of unconscious acts – including but not limited to inhaling deeper, more frequent puffs, larger puffs and holding the smoke in the lungs for a longer period of time – that enable the smoker to regulate the amount of nicotine, and hence tar, received by the smoker. Dr. Benowitz credibly testified that these unconscious acts result in there being no difference for an individual smoker between the tar and nicotine delivery from a Marlboro Lights cigarettes as compared to a regular Marlboro cigarette (the same being true of Cambridge Lights cigarettes and regular Cambridge cigarettes).

62. Dr. Benowitz and other expert witnesses explained that the reason compensation occurs is that smokers regulate their intake of nicotine, a pharmacologically active drug. Smokers change their smoking behavior in largely unconscious ways, particularly with respect to the products at issue in this case, to obtain the dose of nicotine required by each individual smoker. Although the nicotine level required by each smoker may vary among smokers, the fact that each smoker will obtain the same amount of nicotine and tar from these Lights cigarettes as from their regular counterparts does not vary.

63. Dr. Benowitz is the leading researcher in the fields of nicotine, addiction and compensatory smoking behavior. He analyzed several different kinds of scientific studies measuring compensatory smoking behavior, including: forced switching studies, cross-sectional studies and spontaneous brand switching studies. Based upon all of his research, experience and his expertise in these scientific areas, Dr. Benowitz offered the scientific conclusion that compensation for this Class is 100%. Significantly, this conclusion was never rebutted by the Defendant.

64. In fact, Philip Morris has publicly taken the position as of November 2002 that people who switch to Light cigarettes are likely to inhale the same levels of cancer-causing toxins. In addition, Philip Morris' own scientific expert, Dr. Richard Carchman, agreed that Philip Morris'

public position regarding compensatory smoking behavior means that consumers are compensating 100% when they switch from a regular cigarette like Marlboro to a Light cigarette like Marlboro Lights.

65. Philip Morris' own internal research regarding compensatory smoking behavior demonstrates that Philip Morris knew since before the launch of Marlboro Lights and Cambridge Lights that smokers will adjust their behavior to receive the same level of tar and nicotine from these Light cigarettes as they would receive from the their regular cigarette counterparts. Although Philip Morris attempted to contradict its own internal studies through the factual testimony of Barbro Goodman, this Court finds this testimony to be not credible and unpersuasive.

66. Based in part upon the fact that smokers of Marlboro Lights and Cambridge Lights engage in complete compensatory smoking behaviors, the Court finds that Marlboro Lights and Cambridge Lights are just as harmful as regular Marlboro and regular Cambridge for all Class members in this case.

67. Plaintiffs also demonstrated that Light cigarettes are just as harmful as regular cigarettes through the unrebutted testimony of Dr. Michael Thun. Dr. Thun is a medical doctor, an expert in epidemiology, and also a coauthor of Chapter 4, Monograph 13 (discussed below). Dr. Thun has specifically studied epidemiology for the past twenty-five years while working at the Centers for Disease Control and the American Cancer Society.

68. Dr. Thun testified, based upon all of his epidemiological experience and all of the studies that he has reviewed, that the machine-measured tar difference between Marlboro Lights and Marlboro (as well as Cambridge Lights and Cambridge) does not lead to any disease reduction whatsoever among these comparative smoking populations. The evidence also establishes that the same is true for the population of Class members in this case. The Court finds this testimony to be both credible and persuasive, as well as un-rebutted on this record.

69. Dr. Thun (along with other witnesses) also credibly testified that Light cigarettes have had other negative impacts on disease risk. Specifically, the false perception that a smoker is reducing risk may cause smokers to delay cessation and cessation has been proven to reduce risk from all forms of disease caused by cigarette smoke. In addition, Dr. Thun testified that Light cigarettes may have impacted initiation rates in a way that has led to negative health consequences for the Class.

70. The evidence at trial demonstrates not only that Marlboro Lights and Cambridge Lights are just as harmful as their regular counterparts, but that these products are actually more harmful and more hazardous than their regular counterparts. The Court finds that Philip Morris was aware of the increased harm from these Light cigarettes based upon their own scientific testing. Philip Morris' knowledge and understanding of increased harm from Lights cigarettes is also demonstrated by Philip Morris' refusal to conduct any additional testing to reconfirm this scientific conclusion of increased harm.

71. Philip Morris' documents, as well as the testimony of Dr. William Farone and Dr. Peter Shields, establish as a factual matter that Philip Morris has known for over twenty-five years that Lights cigarettes like Marlboro Lights and Cambridge Lights – with increased ventilation – are more mutagenic than cigarettes with less ventilation.

72. Philip Morris conducted mutagenesis studies as part of its toxicological evaluation in order to predict the carcinogenic potential of their products and product design changes. The testimony at trial established that Philip Morris believed its biological test results (in the form of Ames mutagenicity testing) to be both meaningful and predictive of carcinogenesis. In fact, several of Philip Morris' scientists testified that the Ames test was the primary biological test relied upon by Philip Morris. This testing was and is used by Philip Morris to demonstrate reduced harm from cigarettes. It is therefore quite

significant that their test results have consistently demonstrated for the past twenty five years that increased ventilation (the primary design distinction between Light cigarettes and their regular counterparts) increases the specific mutagenicity of cigarette smoke.

73. Although Philip Morris attempted to reduce the evidentiary significance of its own testing through the testimony of Dr. Richard Carchman, the Court does not find this testimony to be credible. The biological testing over the past twenty five years has consistently demonstrated an increase in specific mutagenicity associated with an increase in ventilation.

74. The fact that Philip Morris intentionally prevented its scientists in the United States from performing additional testing does not undermine the credibility and reliability of the testing that Philip Morris did perform. In fact, this intentional failure to conduct additional testing further demonstrates Philip Morris' belief that Light cigarettes were and are more harmful than their regular counterparts.

75. Plaintiffs also introduced credible testimony regarding the specific toxicity levels of cigarette smoke comparing Marlboro Lights cigarettes to regular Marlboro. Based upon the constituent toxicity testing results performed by Philip Morris itself and other tobacco manufacturers in the context of the Massachusetts Benchmark Study ("MBS"), Plaintiffs demonstrated through Dr. Jeffrey Harris that Marlboro Lights has higher specific toxicity levels for almost all of the toxic substances measured in cigarette smoke in the MBS.

76. This testimony and evidence is particularly persuasive and disturbing. These toxicity levels measured in the MBS study demonstrate that even if a smoker does not compensate completely (a fact itself which is contrary to the evidence presented), a smoker of Marlboro Lights will receive higher levels of most of the toxic substances found in cigarette smoke from a Marlboro Lights than they will receive from a regular Marlboro. The Court

notes that the constituent toxicity testimony was completely unrebutted.

77. Specifically with respect to the two toxic substances Philip Morris itself has targeted for reduction as a means of demonstrating harm reduction (Acrolein and 1,3-Butadiene), a smoker of Marlboro Lights need only compensate 14% to receive higher levels of these two specific toxic substances. Therefore, the Court finds that Marlboro Lights and Cambridge Lights, based upon the similar design distinction of increased ventilation, are more harmful for every Class Member than a regular Marlboro or a regular Cambridge cigarette.

78. Plaintiffs introduced credible scientific and epidemiological evidence that connected the dramatic increase in adenocarcinomas (lung cancer of the peripheral lung cells) to the increased prevalence of Light cigarettes like Marlboro Lights and Cambridge Lights. The unrebutted expert testimony of Dr. Peter Shields and Dr. Michael Thun - establish that Marlboro Lights and Cambridge Lights have contributed to the dramatic rise in adenocarcinoma cancer rates, thereby demonstrating another line of evidence that establishes increased harm from these "Light" cigarette products.

79. Plaintiffs offered extensive evidence, both documentary and through expert witnesses, relating to the October 2001 consensus public health publication entitled *Monograph 13 – Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* – published by the United States Department of Public Health and Human Services – Public Health Service – National Institutes of Health – National Cancer Institute. Monograph 13 represents the first public health community consensus that cigarettes with lower machine-measured yields of tar and nicotine (including Light cigarettes like Marlboro Lights and Cambridge Lights) do not lower the risk of disease as compared to higher yield cigarettes (like regular Marlboro and regular Cambridge).

80. Philip Morris made no attempt to rebut the testimony that Monograph 13 represented the first scientific consensus regarding the lack of any harm reduction associated with Light cigarettes. In fact, Philip Morris made no attempt to contradict any of the conclusions within Monograph 13. Based upon the fact that Monograph 13 represents the first consensus within the public health community as to the lack of any harm reduction from Light cigarettes, the Court finds that Class in this case could not have known of the fraud associated with Marlboro Lights and Cambridge Lights prior to the publication of Monograph 13 in October 2001. Further, the conclusions of Monograph 13 itself establish that Philip Morris recognized the inherent deception of offering cigarettes as "Light" and "Lowered Tar and Nicotine".

81. Although Philip Morris offered isolated references in scientific publications prior to the issuance of Monograph 13 of the potential for the benefit of low tar cigarettes to have been overestimated, the first public community consensus on the lack of any benefit from Light cigarettes as compared to regular cigarettes occurred after the Class Period in this case. As discussed previously, Philip Morris' contention that the public health community should somehow be blamed for the fraud associated with Lights cigarettes is both morally abhorrent and factually incorrect. At all times since the inception of their Lights products, Philip Morris was aware of their deception and was aware that the public health community was among those deceived by the fact that their products did not deliver the promised lower tar and nicotine and were not "light" as represented. Yet, it was not until the fall of 2002 that they disseminated this knowledge. As such, they cannot assert that the Class should have known information which they chose not to publicly reveal until November 2002. The fact that Philip Morris found it necessary to reveal this information so prominently on their website, in newspaper inserts, and by placing onserts in their cigarette packs demonstrates that Philip Morris un-

derstood that consumers of their product were not aware of the information contained in these materials.

82. The proper measure of damages under the Illinois Consumer Fraud Act is to measure the difference between the value the product would have had at the time of the sale if the representations had been true and the actual value to the consumer of the property sold. *See Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 538 N.E.2d 530, 537-38 (Ill.1989). *See also Manjal v. Baird & Worner, Inc.*, 92 Ill.Dec. 809, 820 (2nd Dist.1985).

83. Both Plaintiffs and Defendant offered testimony from economists regarding the proper economic method to measure the damages to the Class. Plaintiffs offered the testimony of Dr. Jeffrey Harris, an expert economist from MIT who is not only a Professor of Economics but also a full time practicing physician. Defendant offered Dr. Kip Viscussi, a Professor of Law and Economics at Harvard Law School. Both of these economic experts were qualified to render opinions regarding economic theory. However, the Court finds the testimony of Dr. Jeffrey Harris more credible and more persuasive than the testimony of Dr. Kip Viscussi.

84. Dr. Harris and Dr. Viscussi essentially agree that the correct economic model for measuring damages in this case should be the difference between the price paid by the consumers in the Class and the value to the consumer of the "misrepresented" cigarette they actually received. The critical distinction between the two models proposed by the two economists in this case is whether the promised product with the promised attributes is made available when determining the value to the consumer (or willingness to pay) for the "misrepresented" Lights.

85. Dr. Harris testified that the only way to accurately measure the damages at the time of the sale or transaction caused by the fraud is to provide as an alternative in the comparative valuation of the product that was promised by Philip Morris.

86. There is no dispute that the promised product in this case is a "genuine" harm reducing "Light" cigarette. Dr. Harris credibly testified that if you do not include the product that was promised in the comparative valuation, you cannot measure the value of the promise, i.e. the harm reduction promise of Marlboro Lights and Cambridge Lights.

87. Dr. Viscussi testified that because the promised product does not exist in the "real world," it should not exist in the valuation measure for this case. This Court rejects the testimony of Dr. Viscussi in this regard. The reason the promised product (i.e. a "real" light cigarette that actually reduces the harm from cigarettes and delivers lowered tar and nicotine) does not exist in the "real world" is that Philip Morris never offered a "real" Marlboro Light or Cambridge Light cigarette to the Class. Philip Morris cannot escape liability in this case from its fraud because of the fact that it never created the product that it promised in Marlboro Lights and Cambridge Lights.

88. Philip Morris acknowledges as of November 2002 that it has never and does not now sell or market any "safer" cigarettes. The newspaper insert distributed throughout the United States through major newspapers and the "onsert" placed on packages of Marlboro Lights for a very brief time in November 2002 both state unequivocally that there is no such thing as a safer cigarette and a consumer should not believe that Lights cigarettes are safer. This Court finds that this disclosure does not minimize but rather dramatizes the deception which took place throughout the Class period. This disclosure certainly cannot serve to avoid liability made, as it was, long after this case was filed. However, these disclosures do establish that even Philip Morris agrees that Marlboro Lights and Cambridge Lights are not any safer than their regular counterparts.

89. In order to measure the damages proximately caused by Philip Morris' misrepresentation, Plaintiffs of-

fered into evidence a valuation study conducted by Dr. Dennis of Knowledge Networks. Knowledge Networks has created a web-enabled probability sample of nationally representative survey respondents in the United States population. Within that population, Dr. Dennis conducted a survey for purposes of this case of Marlboro Lights smokers to measure the value of the health attribute aspect of Marlboro Lights to consumers in order to determine the damage caused by Philip Morris' fraud.)

90. The Court finds that the measured value of this health attribute is the damage proximately caused by Philip Morris' fraud in this case Philip Morris implicitly represented Marlboro Lights and Cambridge Lights as less harmful or safer. The Knowledge Networks survey provided an accurate measure of damages to the Class members in this case by measuring the difference between the price paid for the cigarettes purchased during the Class Period and the value to the Class members of the product actually received – a product that not only was just as harmful as a regular cigarette but in fact could be more harmful. The aggregate diminution in value measured by the Knowledge Networks survey caused by Philip Morris' fraud was calculated to be 92.3%.

91. Although the Knowledge Networks survey measured damages as an aggregate average for a representative sample of Marlboro Lights smokers and not for Cambridge Lights smokers, the Court finds, based upon all of the testimony offered in this case, that there is no reason to believe that Cambridge Lights smokers would have a different aggregate average valuation of the health attribute of their Light cigarette than Marlboro Lights smokers. In fact, this Court finds as a factual matter that the damages from the fraud relating to the "Lights" descriptor for Class members who purchased Marlboro Lights is, in the aggregate average, the same as the aggregate average damages to Class members who purchased Cambridge Lights.

92. The Court finds, based in part upon the testimony of Dr. Dennis who designed and implemented the Knowledge Networks valuation survey, that the survey conducted by Knowledge Networks did provide an accurate measure of the damage suffered by the Class members in this case.

93. Philip Morris attempted to challenge the accuracy of the survey measurement through the testimony of Dr. Nancy Mathiowetz. However, the Court finds that the survey criticisms offered by Dr. Nancy Mathiowetz were neither credible nor persuasive. In fact, Dr. Mathiowetz admitted that she had no opinion whatsoever as to the directional impact of any of the criticisms she identified with respect to this data. Moreover, the criticisms identified by Dr. Mathiowetz were specifically refuted by Dr. Stanley Presser. The Court finds the testimony of Dr. Presser on the issues relating to survey data to be credible and persuasive.

94. Philip Morris offered the testimony of Dr. Viscussi to also criticize the survey data and to try to establish that a report conducted for the National Oceanic and Atmospheric Administration ("NOAA") contained relevant survey guidelines for this case. However, Dr. Presser credibly testified that these NOAA criteria have no applicability to the Knowledge Networks survey conducted to measure damages in this case.

95. Based upon the diminution in value measured by Dr. Dennis' survey, Dr. Jeffrey Harris, a qualified medical doctor and economist with over 25 years experience in health economics, calculated the total damages to Class members in this case.

96. First, Dr. Harris calculated the total consumer expenditure for Class members on both Marlboro Lights and Cambridge Lights for the relevant portion of the Class period. Because the private cause of action under Section 2 of the Illinois Consumer Fraud Act was not effective until October 1973, the Court finds the appropriate period for damages calculation in this case to be from October 1973

through February 8, 2001. Dr. Harris calculated the relevant total consumer expenditure to be $7.6298 Billion. None of this consumer expenditure testimony was rebutted in any way by Philip Morris.

97. The next step in Dr. Harris' damages calculation was to compute the aggregate damages by multiplying the appropriate diminution in value (92.3%) times the relevant total consumer expenditure of Class members in this case. Based upon this time period for determining the relevant total consumer expenditure, Dr. Harris calculated the compensatory damages to Class members to be $7.1005 billion.

98. This compensatory damage calculation includes a 5% non-compounded prejudgment interest component – in the amount of $2.1137 Billion. The Court finds under the circumstances of this case (and under the Illinois Consumer Fraud Act) that prejudgment interest is appropriate generally to this case and for this amount to be appropriate specifically.

99. The Court finds that Plaintiff Sharon Price has proven on an individual claim basis that Philip Morris has violated the Illinois Consumer Fraud Act by misrepresenting Cambridge Lights as "Lights," meaning safer and lower in tar than regular Cambridge. Philip Morris intended for Plaintiff to rely upon the deception of this misrepresentation. This misrepresentation occurred in the course of conduct involving trade or commerce and caused actual damage to Ms. Price in an amount calculated by multiplying her total consumer expenditure (which was established during trial to be $12,334.53) by the aggregate average diminution in value of 92.3% resulting in $11,384.77 of actual damages proximately caused by the misrepresentation of Philip Morris. The Court finds that Plaintiff has also established Philip Morris has violated the Uniform Deceptive Trade Practices Act by demonstrating that Philip Morris' fraudulent conduct offends public policy in an immoral and unethical way that caused substantial injury to Plaintiff as a consumer.

100. The Court finds that Plaintiff Michael Fruth has proven on an individual claim basis that Philip Morris has violated the Illinois Consumer Fraud Act by misrepresenting Marlboro Lights as "Lights" and "Lowered Tar and Nicotine" – meaning safer and lower in tar than regular Marlboro cigarettes. Philip Morris intended for Plaintiff to rely upon the deception of this misrepresentation. This misrepresentation occurred in the course of conduct involving trade or commerce and caused actual damage to Mr. Fruth in an amount calculated by multiplying his total consumer expenditure (which was established during trial to be $19,297.55) by the aggregate average diminution in value of 92.3% resulting in $17,811.64 of actual damages proximately caused by the misrepresentations of Philip Morris. The Court finds that Plaintiff has also established that Philip Morris has violated the Uniform Deceptive Trade Practices Act by demonstrating that Philip Morris' fraudulent conduct offends public policy in an immoral and unethical way that caused substantial injury to plaintiff as a consumer.

101. Philip Morris' demand for a trial by jury is denied. There is no right to a jury trial under the Illinois Consumer Fraud Act. Plaintiffs' Second Amended Complaint is a one count Complaint containing only claims under the Illinois Consumer Fraud Act. Therefore, Philip Morris has no right to a jury trial in this case.

102. Philip Morris filed twenty-seven Affirmative Defenses in response to Plaintiffs' Second Amended Complaint. During the course of the trial, Philip Morris made an oral motion for mistrial based upon its alleged inability to pursue and develop its Affirmative Defenses. That Motion for Mistrial is denied. At no point during discovery in this litigation did the Court limit in any way Philip Morris' ability to pursue its Affirmative Defenses or to disclose and present expert testimony related thereto. The record demonstrates that during discovery, Philip Morris disclosed several experts with opinions related to its Affirmative Defenses. During the course of the trial, Philip

Morris presented evidence (albeit not persuasive) on many of its Affirmative Defenses. Philip Morris specifically pled all its Affirmative Defenses in response to Plaintiffs' Second Amended Complaint and was at no time denied the opportunity to develop these defenses.

103. Although Plaintiffs failed to answer Philip Morris' Affirmative Defenses in a timely manner, Plaintiffs did ultimately respond to Philip Morris' Affirmative Defenses and the Court finds no prejudice from this late response.

104. All of Philip Morris' Affirmative Defenses are denied for the reasons identified herein.

105. Philip Morris' First Affirmative Defense – Statute of Limitations – is denied as legally insufficient because none of the allegations relate to knowledge that would trigger a Statute of Limitations for the claims in this case. Philip Morris has the burden of establishing that Class members knew of the fraud and failed to act on that knowledge. However, even if Class members knew all of the facts alleged here, they did not have knowledge of the fraud. With respect to subparagraphs (a) through (e), these allegations are legally insufficient because they relate to alleged knowledge of the general dangers of smoking as opposed to the fraud allegations related to Marlboro Lights and Cambridge Lights. Sub-paragraph (f) is legally insufficient because whether Class members knew the intention of the FTC machine measurements is not relevant to the claims at issue in this case. As to subparagraph (g), even if these factual allegations were known to some Class members, this knowledge is legally insufficient for the Statute of Limitations Affirmative Defense, because it does not establish knowledge of the increased harm relating to Marlboro Lights and Cambridge Lights cigarettes.

106. Philip Morris' Statute of Limitations Affirmative Defense also fails based upon the discovery rule. The discovery rule, which "delays the commencement of the relevant statute of limitations until the plaintiff knows or reasonably should know that he has been injured and

that his injury has been wrongfully caused[,]" applies to consumer fraud cases. *Hermitage Corp. v. Contractors Adjustment Co.*, 651 N.E.2d 1132, 1135-36 (Ill.1995).

107. "When a plaintiff uses the discovery rule to delay commencement of the statute of limitations, the plaintiff has the burden of proving the date of discovery." *Id.* at 1138. Both Plaintiffs allege that they were "without knowledge of the conduct by Defendant alleged in this Complaint, or of any facts from which it might reasonably be concluded that Defendant was so acting, or which would have lead to the discovery of such action, until after the filing of this action." Second Amended Complaint ¶¶ 13, 14. The Court finds that neither Plaintiffs nor Class members had either actual or constructive knowledge prior to the filing of this case of the essential injury which is the subject of Plaintiffs' Complaint: economic loss caused by Philip Morris' descriptors representing that Marlboro Lights and Cambridge Lights are safer than their regular counterparts when, in fact; these Lights cigarettes are more harmful than regular cigarettes.

108. Philip Morris' Second Affirmative Defense of Laches is an equitable defense and does not apply to Plaintiffs' claims under the Illinois Consumer Fraud Act. Even if such a defense would apply, the factual basis for laches is insufficient as a matter of law for the reasons identified in the discussion regarding their proposed Statute of Limitations defense.

109. Philip Morris' Third Affirmative Defense – Waiver – is denied because it is not an affirmative defense but instead is a denial of proximate cause.

110. Philip Morris' Fourth Affirmative Defense – Impermissible Claims Splitting – is denied for the reasons identified in this Court's Certification Order entered on February 8, 2001.

111. Philip Morris' Fifth Affirmative Defense – Federal Preemption – is denied. Philip Morris has argued in its summary judgment briefs and throughout this trial that Plaintiffs claims in this case are preempted by the Fed-

eral Cigarette Advertising and Labeling Act, 15 U.S.C. § 1331, *et seq.* ("FCLAA"). § 1334(b) of the FCLAA which provides that "no requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes, the packages of which are labeled in conformity with the provisions of this Act." 15 U.S.C. § 1334(b). Philip Morris contends that this provision expressly preempts the claims brought by Plaintiffs in this case. The Court finds that none of Plaintiffs' claims in this case are expressly preempted by the FCLAA.

112. The United States Supreme Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), in interpreting the FCLAA, held that claims relating to Philip Morris' failure "to provide adequate warnings of the health consequences of cigarette smoking" and claims that Philip Morris attempted to "neutralize the warning labels" would both be preempted. 505 U.S. at 510, 524 & 528. However, Plaintiffs claims in this case are neither based upon a failure of Philip Morris to provide adequate warnings nor based upon a neutralization claim. Instead, Plaintiffs claims in this case "are predicated not on a duty, based on smoking and health, but rather on a more general obligation-the duty not to deceive." *Id.* at 528-29.

113. The Illinois Consumer Fraud Act makes unlawful "unfair or deceptive acts or practices including but not limited to the use or employment of any deception, fraud, pretense, false promise, misrepresentation or concealment, suppression or omission of any material fact . . . in the conduct of any trade or commerce[.]" 815 ILCS § 505/2. The Court finds that Plaintiffs' claims in this case are based upon the independent duty not to deceive under state law. "[T]he predicate of this claim is a state-law duty not to make false statements of material fact or to conceal such facts." *Cipollone*, 505 U.S. at 528.

114. Plaintiffs have alleged essentially two types of misrepresentation claims under the Illinois Consumer Fraud Act. First, Plaintiffs have asserted that Philip

Morris' representations that their Marlboro Lights and Cambridge Lights cigarettes are "Light" and that Marlboro Lights are "Lowered Tar and Nicotine" are false. The Court finds this claim to be wholly unrelated to any failure to warn claim and, therefore, not preempted.

115. Plaintiffs second type of misrepresentation claim relates to Philip Morris' representations of lower tar (both explicitly and implicitly through the use of the descriptor "Lights" which communicates lower tar). Here, even if for some consumers the statements relating to lower tar could be technically true as far as that statement goes (which is contrary to the evidence presented), these statements are nevertheless fraudulent and misleading, because the tar from these "light" cigarettes is more harmful and higher in toxic substances. Therefore, this claim, whether characterized as an omission or simply as a false and misleading statement, does not implicate a failure to warn claim as Philip Morris contends and is not preempted.

116. Philip Morris is not under any obligation to warn or provide any additional information regarding the tar content in its cigarettes based upon Plaintiffs' misrepresentation/omission claims. Philip Morris' representations regarding the lower tar level of Light cigarettes (while knowing that the tar from these cigarettes is actually more harmful and of a different constituency) is false and misleading and violates Philip Morris' independent state law duty not to deceive. In *Cipollone*, the Supreme Court noted that "Congress offered no sign that it wished to insulate cigarette manufacturers from long standing rules governing fraud." 505 U.S. at 529.

117. Therefore, the Court holds that Plaintiffs' claims regarding the fraudulent misrepresentations of lower tar – without materially qualifying that statement – are not preempted. It is irrelevant for this analysis whether this claim is characterized as an omission or not. In either event, no failure to warn is being claimed in this context. Instead, all of Plaintiffs' claims are "intentional fraud and

misrepresentation both by false representation of a material fact and by concealment of a material fact"[.] *See Cipollone*, 508 U.S. at 528.

118. Philip Morris also contends that Plaintiffs' claims in this case somehow conflict with the regulations and policies of the Federal Trade Commission ("FTC"). In support of this position, Philip Morris offered testimony of John Peterman, an economist formerly with the FTC Bureau of Economics. The Court finds this testimony to be unpersuasive on the issue of conflict preemption. Further, the Court finds the testimony of Mr. Peterman to be unrelated to any potential areas of his expertise. Instead, he offered a narrative summary of historical facts. The Court finds that he has no expertise in assessing FTC involvement in regulation of the issues surrounding the allegations of Plaintiffs' Complaint. Based upon the evidence presented in this case, both in the form of testimony and documents, the Court finds that Plaintiffs' claims in this case do not conflict with the FCLAA or with any regulations or policies of the Federal Trade Commission.

119. Neither the FCLAA nor any regulation of the FTC governs the conduct at issue in this case – Philip Morris' voluntary use of "Lights" and "Lowered Tar and Nicotine" descriptors on its cigarette packages. Under the facts and circumstances in this case, the fact that the FTC has not adopted regulations regarding the use of the "Lights" and "Lowered Tar and Nicotine" descriptors (even if the FTC has at certain points in time considered such regulations) does not create conflict preemption. See *Sprietsma v. Mercury Marine*, 123 S.Ct. 518, 527-29 (2002).

120. Philip Morris' Sixth Affirmative Defense – Primary Jurisdiction – is denied. Philip Morris contends that the matters related to these claims are within the special expertise of the FTC and that there is a need for a uniform application of these administrative standards. Mr. Peterman offered no convincing evidence regarding the FTC "special expertise" on the issues relevant to this case and the Court finds him unqualified to render such

an opinion in any event. Philip Morris claims that "plaintiffs have acknowledged these materials adequately allege primary jurisdiction". Regardless of the adequacy of any allegations, the Court finds that the evidence introduced at trial does not establish either that the FTC has specialized or technical expertise regarding the claims at issue in this case or that there is a need for uniform administrative standards in this context. See *Employers Mutual Co. v. Skilling*, 162 Ill.2d 284, 288-89 (1994).

121. Philip Morris has failed to demonstrate through evidence offered at trial that the FTC has some specific specialized or technical expertise such that this Court should defer to the FTC rather than adjudicating this matter. In fact, the Court finds that the evidence and testimony at trial demonstrates that the FTC lacks such expertise and has publicly acknowledged this lack of expertise on numerous occasions. The claims in this case concern fraud and deception under the Illinois Consumer Fraud Act and the Uniform Deceptive Trade Practices Act. This Court is well equipped to determine these issues. See *Crain v. Lucent Technologies*, 317 Ill.App.3d 486, 495 (5th Dist.2000).

122. The Court notes that Philip Morris has attempted to mis-characterize Plaintiffs' claims in an attempt to succeed on its affirmative defenses. Plaintiffs' claims in this case are not based upon any challenge to the FTC machine measuring procedures or the tar and nicotine ratings published based upon those testing procedure. Plaintiffs' claims in this case are related to Philip Morris' specific intentional misrepresentations on the packages of Marlboro Lights and Cambridge Lights.

123. The fact that Philip Morris intentionally designed these "Lights" products to register lower on the FTC machine measurements than actually delivered to the consumer is only relevant to the extent Philip Morris has used these lower FTC machine measurements as an attempted justification for the use of its fraudulent descriptors. Based upon the evidence introduced at trial, the

lower machine measurements of tar and nicotine on the FTC machine do not justify Philip Morris' use of these descriptors. In any event, the fact that Philip Morris attempted to defend its fraudulent misrepresentations based upon FTC measurements does not convert Plaintiffs' claims into claims based upon those measurements.

124. Philip Morris' Seventh Affirmative Defense – Compliance with Government Regulations – is denied. The false and misleading use of the descriptors "Lights" and "Lowered Tar and Nicotine" has never been specifically authorized by law. Philip Morris voluntarily chose to use these terms on its packages of Marlboro Lights and Cambridge Lights. No regulatory body has ever required (or even specifically approved) the use of these terms by Philip Morris. The Court finds that Philip Morris has not established that its conduct is "specifically authorized" by law. See *Aurora Fire Fighters Credit Union v. Harvey*, 516 N.E.2d 1028, 1036 (Ill.Ct.App.1987).

125. Philip Morris' Eighth Affirmative Defense – First Amendment to the United States Constitution – is denied. Philip Morris' claims that the descriptors "Lights" and "Lowered Tar and Nicotine" provide accurate information regarding the FTC machine-measured tar and nicotine yields of Marlboro Lights and Cambridge Lights cigarettes. Here again, Philip Morris attempts to inject the FTC measurements as an apparent justification for the fraudulent use of these descriptors.

126. The First Amendment of the United States Constitution does not protect speech in the commercial context that is deceptive and misleading. This Court has found that Philip Morris' use of these descriptors violates the Illinois Consumer Fraud Act because these representations are false, misleading, deceptive and untrue. Therefore, the First Amendment does not protect this speech.

127. Philip Morris' Ninth Affirmative Defense – Article I, Sections 4 and 5 of the Illinois Constitution – is denied

for the same reasons the Eighth Affirmative Defense is denied.

128. Philip Morris' Tenth Affirmative Defense – No Safer, Feasible, Alternative Design – is denied as a matter of law because this defense is inapplicable to a claim under the Illinois Consumer Fraud Act. The issue in this case is not whether Philip Morris could have designed genuinely safer "Light" cigarettes but whether Philip Morris deceptively used the descriptors "Lights" and "Lowered Tar and Nicotine" on the packages of Marlboro Lights and Cambridge Lights sold in Illinois. In any event, Philip Morris has failed to establish that a safer alternative design for Lights cigarettes was not feasible. In fact, the testimony of William Farone both as a fact witness and as an expert witness on cigarette design established that alternative cigarette design options were available to Philip Morris that would have actually reduced the tar delivery to consumers without raising the level of toxins in cigarette smoke.

129. Philip Morris' Eleventh Affirmative Defense – Failure to Mitigate – is denied as a matter of law. The Court finds as a threshold matter that this contention of Class members' failure to mitigate has no applicability to the facts and circumstances of this case. Moreover, Philip Morris has failed to offer evidence that establishes Class members knew about the fraud during the Class Period and failed to take reasonable steps to prevent new harm or damages.

130. Philip Morris' Twelfth Affirmative Defense – Assumption of the Risk – is denied. Even if Class members knew all of the factual allegations identified in paragraph 43, any risk related to the fraud at issue in this case would not be "assumed." These allegations relate largely to the harmful aspects of cigarettes generally as opposed to the fact that Light cigarettes are more harmful than their regular counterparts.

131. Philip Morris' Thirteenth Affirmative Defense – Common Knowledge – is denied. Even if Class members

knew of these facts, this would not establish the defense of common knowledge to the claims in this case. Moreover, this is not a proper Affirmative Defense but simply a re-characterization of Philip Morris' defense against causation.

132. Philip Morris' Fourteenth Affirmative Defense – Information in the Public Domain – is denied for the same reasons as the Thirteenth Affirmative Defense.

133. Philip Morris' Fifteenth Affirmative Defense – Inappropriate Retroactive Application of the Law – is granted only to the extent that Plaintiffs' claims for damages on sales prior to October 1, 1973 are denied.

134. Philip Morris' Sixteenth Affirmative Defense – Inherent Characteristic – is denied because even if these facts are true, they do not constitute an Affirmative Defense to the fraud claims at issue in this case.

135. Philip Morris' Seventeenth Affirmative Defense – State of the Art – is denied for the same reasons as the Affirmative Defenses of "No Safer Feasible Design" and the "Inherent Characteristic" have been denied. The Court notes that these three Affirmative Defenses – although not relevant to the fraud claims for purposes of compensatory damages in this case – do allege facts that may be relevant to issues regarding punitive damages. However, these facts, even if relevant to punitive damages, do not constitute an Affirmative Defense to such a claim.

136. Philip Morris' Eighteen Affirmative Defense – Res Judicata – is based upon the allegation that the claims at issue in this case are barred, in whole or in part, by the res judicata effect of the case captioned *Illinois v. Philip Morris, Inc. et al.*, No. 96 L 13146. The Court finds that the claims in this case are not barred by the res judicata effect (if any) of the judgment in this other Illinois case.

137. Philip Morris' Nineteenth Affirmative Defense – Master Settlement Agreement Release – is denied. The

Court holds that the claims at issue in this case were not released under the Master Settlement Agreement.

138. Philip Morris' Twentieth Affirmative Defense – Comparative Fault – is denied. Even if the allegations in support of this Affirmative Defense were true, Plaintiffs and Class members did not violate any duty to exercise reasonable care and caution to prevent the harm alleged in Plaintiffs' Complaint.

139. Philip Morris' Twenty First Affirmative Defense – Lack of Standing to Sue – is denied as not properly pled as an Affirmative Defense. Philip Morris' allegations regarding lack of standing to sue are simply that the Class has not suffered any damages. This is not sufficient to plead an Affirmative Defense for lack of standing in this case.

140. Philip Morris' Twenty Second Affirmative Defense – Punitive Damages Claim Barred as Excessive Fine as Violation of Due Process and Equal Protection Causes – is denied. The punitive damages award in this case does not violate either the Due Process or the Equal Protection clauses of the United States Constitution or the Illinois Constitution.

141. Philip Morris' Twenty Third Affirmative Defense – Punitive Damages Fails to Provide Jury with Adequate Safeguards – is denied as irrelevant to this case wherein there is no jury. To the extent this Affirmative Defense is meant to apply to the Court, the Court denies this Affirmative Defense. The Court will provide itself with adequate standards for imposing or determining punitive damages under Illinois law.

142. Philip Morris' Twenty Fourth Affirmative Defense – Punitive Damages Statute Unconstitutional – is denied. The Illinois Consumer Fraud and Deceptive Practices Act is not unconstitutional based upon any allegation in this Affirmative Defense.

143. Philip Morris' Twenty Fifth Affirmative Defense – Punitive Damages Barred Without Rights Accorded to

Criminal Defendants – is denied. Philip Morris has been denied no rights to which it is entitled under the United States Constitution or the Illinois Constitution.

144. Philip Morris' Twenty Sixth Affirmative Defense – Punitive Damages Claim Barred as Violation of United States and Illinois Constitutions – is denied. The claim of punitive damages in this case does not violate the United States Constitution or the Illinois Constitution based on the facts alleged in this Affirmative Defense. It appears these allegations misconstrue the Class Action procedure in Illinois or are an attempt to recharacterize Plaintiffs' claims. In addition, these allegations primarily relate to jury discretion and potential punitive damages awards by a jury. The Court believes this Affirmative Defense was filed in error and should have been voluntarily withdrawn by Philip Morris as there is no jury and has been no jury in this case.

145. Philip Morris' Twenty Seventh Affirmative Defense – Punitive Damages Claim Barred as Speculative – is denied. Plaintiffs have stated facts sufficient to entitle Plaintiffs and Class members to an award of punitive damages and the award in this case is justified.

146. After considering all the testimony and evidence admitted at trial, the Court finds that the Plaintiffs have proven that Philip Morris has violated the Consumer Fraud Act through the deceptive act of misrepresenting its Cambridge Lights and Marlboro Lights products as "Lights" and misrepresenting Marlboro Lights as "Lowered Tar and Nicotine". The Court further finds that Philip Morris intended that the Class members in this case rely upon the deception created by these misrepresentations. These misrepresentations occurred in the course of conduct involving trade or commerce and caused actual damage to the Plaintiffs in the amount of $7.1005 Billion. This actual damage to the Plaintiffs was proximately caused by the misrepresentations of Philip Morris.

147. The Court finds that based upon Philip Morris' course of conduct with respect to the representations of "Lowered Tar and Nicotine" and "Lights" that Philip Morris' practices offend public policy, are immoral, unethical, oppressive and unscrupulous and that this course of conduct caused a substantial injury to the Class members in this case. Therefore, the Court finds that Philip Morris has violated the Illinois Consumer Fraud Act and the Uniform Deceptive Trade Practices Act.

148. The Court has also considered whether punitive damages should be awarded for Philip Morris' violation of the Illinois Consumer Fraud Act. Section 10(a) of the Consumer Fraud Act permits the trial Court, in its discretion, to award punitive damages. 815 ILCS § 505/10(a). The purpose of awarding punitive damages is to punish the wrongdoer and, in so doing, deter that party and others from committing similar wrongful acts.

149. The Court recognizes that punitive damages are not favored in the law and this Court is careful not to award such damages improperly or unwisely. However, the course of conduct by Philip Morris related to its fraud in this case is outrageous, both because Philip Morris' motive was evil and the acts showed a reckless disregard for the consumers' rights. As a consequence, punitive damages are appropriate in this case.

150. The Court has reconsidered its conclusions regarding "book value" and net worth for purposes of determining the amount of the punitive damages award in this case. As a threshold matter, there is no dispute that the evidence regarding Philip Morris' worth is relevant to an award of punitive damages.

151. Philip Morris has argued and the Court initially indicated its agreement with the proposition that a company's worth may be ascertained only by reference to the company's book value net worth. Upon review of the case law cited by the parties, the Court finds that this is an inaccurate statement of Illinois law and of the law in the Fifth District Appellate Court in particular.

152. Philip Morris argued that the Fifth District's decision in *Fopay v. Noveroske*, 334 N.E.2d 79, 31 Ill.App.3d 182 (5th Dist.1975), restricts the Court's valuation of Philip Morris' worth to its book value net worth. The *Fopay* Court held no such thing. As the Fifth District has itself explained on at least two subsequent occasions, "[i]n *Fopay*, the court held that evidence of net earnings was not admissible on the issue of punitive damages because earnings were intertwined with net worth." *Cox v. Doctor's Assoc., Inc.*, 245 Ill.App.3d 186, 613 N.E.2d 1306, 1321, 184 Ill.Dec. 714, 729 (5th Dist.1993). Accord *Central Bank-Granite City v. Ziaee*, 188 Ill.App.3d 936, 544 N.E.2d 1121, 136 Ill.Dec. 346 (5th Dist.1989) ("The *Fopay* court found that evidence of net earnings in addition to net worth was wrong because 'past earnings are necessarily and inextricably intertwined with net worth . . .'"). Moreover, in both of those cases *Cox* and *Ziaee*, the Fifth District permitted evidence of earnings in lieu of evidence of net worth; indeed, even in *Fopay* the trial court's admission of earnings evidence was held to constitute harmless error.

153. The issue for my determination which is not addressed in *Fopay* is what constitutes proper evidence of Philip Morris Incorporated's actual value or "worth." Philip Morris contends that only book value is proper evidence, but the Court finds that is not the law in this state. The Fifth District has held that discovery "aimed at discovering defendant's net worth or pecuniary position" is entirely proper on the issue of punitive damages. *Pickering v. Owens-Corning Fiberglas Corp.*, 265 Ill. App.3d 806, 824, 638 N.E.2d 1127, 1139, 203 Ill.Dec. 1, 13 (5th Dist.1994). "We are aware of no Illinois case which limits the scope of financial discovery relating to punitive damages." *Id.*

154. The purpose of such discovery is to enable a plaintiff to uncover a "defendant's true net worth, which may or may not be accurately reflected in its published annual reports and proxy statements." *Id.*, 638 N.E.2d at 1140,

203 Ill.Dec. at 14. In *Pickering*, the Fifth District held that the plaintiffs were entitled to discovery of "a detailed financial statement, similar to the one used by management and directors of defendant," "all business plans and financial projections related to future operations of defendant," and "all appraisals, estimates or other statements of the fair market value of the assets and liabilities of [defendant] along with the means or methodology of determining said market value and the purpose for which said fair market value was calculated." *Id.*, 638 N.E.2d at 1139-40, 203 Ill.Dec. at 13-14.

155. As the Fifth District recognized in *Fopay*, "the objective of admitting evidence as to defendant's wealth is to give the jury a true idea of defendant's ability to pay a punitive judgment." 334 N.E.2d at 94. As the Fifth District recognized almost twenty years later in *Pickering*, in order to get a "true idea" of a defendant's ability to pay, a plaintiff is entitled to discover and prove a defendant's "true net worth." Therefore, this Court will consider all evidence submitted by Plaintiffs to determine Philip Morris Incorporated's "true net worth."

156. As the Court indicated during trial, a straightforward accounting calculation based upon Philip Morris USA's operating income would establish the Defendant's true net worth to be $50 billion. Plaintiffs offered testimony that based upon the market capitalization of the parent company, Altria, the net worth would be approximately $25 billion. The Court finds Defendant's true value or worth to be between $25 billion and $50 billion.

157. The Court is mindful of the fact that in determining the amount of a punitive damages award, the Court should consider the nature and enormity of the wrong in addition to the Defendant's financial status and potential liability in other cases. The Court has considered these factors and determined that an award of three billion dollars ($3 billion) is appropriate under the facts and circumstances of this case. This entire sum of punitive damages is, hereby, awarded to the State of Illinois.

158. Attorneys who recover a common fund for the benefit of persons other than themselves and their clients are entitled to compensation for their services out of the fund as a whole. *Scholtens v. Schneider*, 173 Ill.2d 375, 385, 671 N.E.2d 657, 662 (1996) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). This rule allows attorney's fees and costs to be shared among all persons who benefit from the creation of the fund. *Id.* at 385, 671 N.E.2d at 662-63. The common fund includes all monies recovered and even extends to punitive damages. *See* 735 ILCS 5/2-1207 ("The trial court may also in its discretion, apportion the punitive damage award among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Human Services.")

159. As a matter of judicial economy and procedural efficiency, the Court finds that it is appropriate for the Court to determine the amount of attorney's fees to be paid out of the common fund simultaneously with my judgment on the merits establishing the common fund.

160. As a consequence, an appeal from an award of attorney's fees (which is a separately appealable final judgment) can be consolidated with any appeal related to the merits of an action. *See Obin v. Dist. 9 of the Int'l Assoc. of Machinists & Aeorospace*, 651 F.2d 574, 584 (8th Cir.1981); *see also Duane Smelser Roofing Co. v. ARMM Consultants, Inc.*, 609 F.Supp 823, 824 (E.D.Mich.1985) ("[Decisions on the appealability of attorney's fees awards] have been predicated on the desirability of avoiding piecemeal appeals and have emphasized that motions for fees should be resolved promptly by District Courts 'so that any appeal by an aggrieved party from an allowance or disallowance of fees can be considered by this court together with any appeal taken from a final judgment on the merits.'") (quoting *Obin*).

We have observed . . . that the problem of fragmented appeals in cases calling for an award of attorney's fees may be obviated if trial judges enter but one judgment

after determining all issues in a case, including the merits of the action and any claim for attorney's fees.

See also Ann. Manual Complex Lit. § 24.222 (3d. ed. 2003) ("Prompt filing of [attorney's fees] motions . . . affords the court an opportunity to rule on the application while the services are still fresh in mind, and allows an appeal to be taken at the same time as an appeal on the merits."); *Ross v. 311 N. Central Ave. Bldg. Corp.*, 130 Ill.App.2d 336, 342, 264 N.E.2d 406, 410 (1st Dist.1970) (award of attorney's fees set forth in same decree as final judgment by circuit court below).

161. The Court finds that Class counsel has rendered a beneficial service to all of the Class in filing and prosecuting this lawsuit and is entitled to compensation for attorneys fees' and expenses. In addition to the verified application, Class counsel also presented Charles Chapman as an expert witness in this case to give opinions regarding attorneys' fees. This Court finds that the percentage-of-the-fund method is the appropriate method of determining fees in this case. *See Brundidge v. Glendale Federal Bank. F.S.B.*, 659 N.E.2d 909, 213 Ill.Dec. 563 (Ill.1995); Court Awarded Attorneys Fees. Third Circuit Report, 108 F.R.D. 237 (1985); *In the Matter of Continental Illinois Securities Litigation*, 962 F.2d 566, 572 (7th Cir.1992); *In the Matter of Synthroid Marketing Litigation*, 264 F.3d 712, 718 (7th Cir.2001).

162. Having determined that the percentage-of-the-fund is the appropriate method for determining attorneys' fees in this case, this Court must now consider the appropriate percentage. In *In the Matter of Continental Illinois Securities Litigation*, the Court noted that Class counsel are entitled to the fee they would have received had they handled a similar suit, with a similar outcome, for a paying client on a contingent fee basis. *In the Matter of Continental Illinois Securities Litigation*, 962 F.2d at 572. Other common fund cases confirm that a requested attorneys fee of 20 to 35% is within the range of reasonable. *See e.g., Spicer v. Chicago Board Options Exchange, Inc.*,

844 F.Supp. 1226, 1252 (N.D.Ill.1993) (court found the award of fees in the amount of 29% of the settlement to be within the "normal" range of attorneys' fees allowed in class actions of that type; based on its own independent research, the court concluded that fee awards typically range from 20% to 50%, and most often constitute 20% to 30% of the fund); *Ryan v. City of Chicago*, 654 N.E.2d 483, 491, 211 Ill.Dec. 21, 29 (Ill.App. 1 Dist.1995)(court upheld the district court's award of attorneys' fees calculated at 33_% of the settlement fund); *Gaskill v. Gordon*, 1995 WL 746091, 3 (N.D.Ill) (court found that case law indicates that the majority of class action fee awards fall between 20% and 30%); *In re Abbott Laboratories Securities Litigation*, 1995 WL 792083, 11, 18 (N.D.Ill.) (court adopted the Special Master's report which concluded that the $10 million fee calculated as just over 30% of the total recovery falls within a reasonable range of percentage-of-recovery fee awards in class action cases); *Florin v. Nationsbank of Georgia, N.A.*, 60 F.3d 1245, 1248-49 (7th Cir.1995) (*Florin II*) (court found that an award of approximately 18.5% of the total settlement fund of $15.5 million was below that typically awarded under the percentage approach in cases with common funds of similar size); *Camden I Condominium Association, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir.1991) (court found that the majority of common fund fee awards fall between 20% to 30% of the fund); *Harmon v. Lyphomed*, 787 F.Supp. 772, 772-74 (N.D.Ill. 1992) (*Harman III*) (on remand, the court awarded attorneys' fees in the amount of 20% of the $9.9 million settlement fund); *Mashburn v. National Healthcare, Inc.*, 684 F.Supp. 679, 692 (M.D.Ala.1988) (court indicated that the majority of common fund fee awards fall between 20% to 30% of the fund); *In re Dun & Bradstreet*, 130 F.R.D. 366, 372 (S.D.Ohio 1990) (commenting that the percentages awarded typically ranging from 20 to 50 percent of the common fund created). Judge Chapman also presented testimony that, in his opinion, 20 to 30% of the common fund was an appropriate range for attorneys' fees and reimbursement of costs in class action cases.

163. This Court has presided over this entire case and conducted extensive hearings with the parties over a period of nearly three years. As a result of the numerous pre-trial proceedings, the court is very familiar with the efforts that were put forth in the prosecution of this case, as well as the complexity of the legal issues. This Court finds that Class counsel took extreme risk in the prosecution of this case, devoting an enormous amount of time and expense without any guarantee of compensation. This Court further finds that this case presented highly complex questions of law and fact, requiring attorneys with extensive skill and experience in complex litigation. The work undertaken by Class counsel and the costs expended in pursuit of this litigation were done so on a purely contingent basis. The large expenditure of costs and the large commitment of attorney and staff time created a very significant risk for Class counsel. Through its efforts, Class counsel has conferred an enormous benefit to the Class.

164. Based on the evidence put forth, and in light of its knowledge of the complexity of the issues presented in this lawsuit, the Court finds that an attorney's fee and cost reimbursement of twenty-five percent (25%) of the compensatory damages awarded in this case is fair and reasonable. However, there will be no award for attorneys' fees on the punitive award in this matter.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the Plaintiffs in this Illinois Consumer Fraud Act Class Action shall recover from Defendant Philip Morris the sum of $7.1005 billion in compensatory damages.

2. That Philip Morris is ordered to pay punitive damages in the amount of three billion dollars ($3 billion). The entire amount of punitive damages is awarded to the State of Illinois.

3. That the Verified Application of Class Counsel for an Award for Attorneys' Fees upon Entry of Judgment and Verdict is GRANTED in the amount of twenty-five

percent (25%) of the compensatory award of $7.1005 billion.

4. That the Court reserves continuing jurisdiction over this action to enforce all provisions of this judgment and to administer and distribute the judgment award among the Class members, based upon appropriate proof of Class membership and claims and to oversee the distribution of all unclaimed funds as provided in Par. 7 hereinbelow.

5. Judgment is entered in the amount of $11,384.77 in favor of Plaintiff Sharon Price, plus all costs of suit.

6. Judgment is entered in the amount of $17,811.64 in favor of Plaintiff Michael Fruth, plus all costs of suit.

7. That in the event there should remain unclaimed funds in the compensatory award rendered herein; then, under the Doctrine of Cy Pres, all said unclaimed funds, when so finally determined by this Court, hereby, are ordered then to be distributed to the following institutions through the Illinois Bar Foundation. Whereupon, the Illinois Bar Foundation is, hereby, appointed to receive, account, protect and so distribute said funds. The distribution of these funds is ordered as follows:

(1) Three percent (3%) to each of the following Law Schools for enhancing studies concerned with the protection of the consumer and with other socio-economic areas of law. Said funds may also be used for providing financial assistance to needy law students. (The total of this award is thirty-three percent (33):

Washington University (St.Louis) School of Law

St. Louis University School of Law

University of Illinois College of Law

Southern Illinois University School of Law

Northern Illinois University College of Law

Northwestern University School of Law

University of Chicago Law School

John Marshall School of Law

Chicago-Kent College of Law (I.I.T.)

DePaul University College of Law

Loyola University Chicago School of Law

(2.) Six percent (6%) to the American Cancer Society for Research in tobacco related cancers.

(3.) Three percent (3%) to all domestic violence programs in the State of Illinois.

(4.) Three percent (3%) to all of the Drug Court programs throughout the State of Illinois.

(5.) Three percent (3%) to each of the following Legal Aid Services in the State of Illinois (all three being not-for-profit corporations):

Land of Lincoln Legal Assistance Foundation, Inc.

Prairie State Legal Services

Legal Assistance Foundation of Metropolitan Chicago

(6.) The remaining funds, being forty-six percent (46%) to the Illinois Bar Foundation for costs that may be incurred in administering the above awards for its own charitable purposes which are statewide and which this Court endorses.

(7.) In keeping with its position regarding any appeal, as stated in Par. 160, hereinabove, this Order is also a final appealable order.

8. That Defendant's request for stay of execution of this Judgment is allowed for a period of thirty (30) days from the entry of this Order. Thereafter, enforcement of the Judgment will be stayed only if an appeal bond is presented and approved pursuant to Supreme Court Rule 305. Bond is set in the amount of twelve billion dollars ($12 billion).

9. All other motions filed by Defendant on March 14, 2003, are denied.

10. That when and as funds become available for the distribution of claims, they will be processed, through primary facilities established in Edwardsville, Illinois,

and secondary facilities in Chicago, Illinois with the costs of these facilities coming out of the attorney's fees herein awarded.

So Ordered.

The Clerk is directed to mail copies of this Order to Counsel of Record.

SUPREME COURT OF ILLINOIS

Springfield, Illinois May 5, 2006

THE FOLLOWING CASE ON THE REHEARING DOCKET WAS DISPOSED OF AS INDICATED:

No. 96236 – Sharon A. Price et al., etc., appellees, v. Philip Morris, Incorporated, appellant.

Appeal, Circuit Court (Madison).

Petition for rehearing denied.

Freeman, J., joined by Kilbride, J., dissenting upon denial of rehearing.

Dissent attached [*see* App., *supra*, 151a-166a]

FEDERAL TRADE COMMISSION (F.T.C.)

Docket 8799

IN THE MATTER OF AMERICAN BRANDS, INC.

CONSENT ORDER, ETC., IN REGARD TO
THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Complaint, Sept. 29, 1969

Decision, Aug. 20, 1971

Consent order requiring a major cigarette manufacturer with headquarters in New York City to cease advertising that its cigarettes are low in tar without clearly disclosing material tar and nicotine content data; tar and nicotine content shall be determined by the testing methods employed by the Federal Trade Commission.

COMPLAINT*

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Brands, Inc., a corporation, hereinafter referred to as the respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent American Brands, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jer-

* Reported as amended by hearing examiner's order of October 24, 1969. Respondent's name was incorrectly stated in the complaint as 'The American Tobacco Company.'

sey, with its principal office and place of business located at 245 Park Avenue, New York, New York.

PAR. 2. Respondent is now, and for some time last past has been engaged in the advertising, sale and distribution of cigarettes including brands designated 'Pall Mall Gold' 100's, 'Pall Mall Menthol' 100's, and 'Lucky Filters.'

PAR. 3. Respondent transports and causes said cigarettes, when sold, to be transported from its places of business in the State of Virginia, and elsewhere, to purchasers thereof located in various other States of the United States and the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said cigarettes in commerce, as 'commerce' is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its aforesaid business, and for the purpose of inducing the purchase of its cigarettes, the respondent has made, and is now making numerous statements and representations in advertising including, but not limited to, advertisements broadcast on radio and television and inserted in magazines, newspapers and other advertising media with respect to the tar content of said cigarettes. Typical and illustrative of said statements and representations, but not all inclusive thereof are the following:

TELEVISION: Good Rich Flavor – Lower in 'Tar'.

RADIO: MAN: Here's good news for particular people * * * people who demand both – good taste and mildness from their cigarette. The newest U.S. Government figures show Pall Mall (Sic) Gold lower in tar than ever before. Lower in tar than the best selling filter king. You make out better at both ends with Big Tip Pall Mall (Sic) Gold. Tastier, Milder, Pall Mall (Sic) Menthol, too.

NEWSPAPERS: And the average puff gives you 26 percent less 'tar' than a non-filter cigarette.

By such statements and others of similar import comprising a comprehensive national advertising campaign and by failing to disclose facts which are material in the light of these statements and which consumers need to make an informed judgment, respondent has represented and created the impression that its cigarettes are low in tar when in truth and in fact its Pall Mall Gold 100's and Lucky Filters contain approximately 20 and 21 milligrams of tar, amounts which rank them 56th and 77th higher among the 122 brands tested than the brand containing the lowest tar level of 4 milligrams.

PAR. 5. By representing its cigarettes as being low in tar when in fact they contain five times the amount of tar found in the lowest yielding brand tested and rank above the midpoint on a tar-yield spectrum running from a low of 4 milligrams to a high of 36 milligrams, respondent has engaged in and practiced falsehood and deception.

PAR. 6. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of cigarettes of the same general kind and nature as those sold by respondent.

PAR. 7. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's product by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of

competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint on September 29, 1969, charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and respondent having been served with a copy of that complaint; and

The Commission having duly determined upon motion duly certified to the Commission that, in the circumstances presented, the public interest would be served by waiver here of the provisions of Section 2.34(d) of its rules, that the consent order procedure shall not be available after issuance of complaint; and

Respondent and counsel for the complaint having thereafter executed an agreement containing a consent order, an admission by respondent of all jurisdictional facts set forth in the complaint, a statement that the signing of the agreement by respondent is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent American Brands, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 245 Park Avenue, in the city of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent American Brands, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of cigarettes in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Stating in advertising that any cigarette manufactured by it, or the smoke therefrom, is low or lower in 'tar' by use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms, unless the statement is accompanied by a clear and conspicuous disclosure of:

1. The 'tar' and nicotine content in milligrams in the smoke produced by the advertised cigarette; and

2. If the 'tar' content of the advertised brand is compared to that of another brand or brands of cigarette, (a) the 'tar' and nicotine content in milligrams of the smoke produced by that brand or those brands of cigarette, and (b) the 'tar' and nicotine content in milligrams of the lowest yield domestic cigarette: Provided, That a comparison to a class of cigarettes, or to many or most of the cigarettes of a class, shall not be deemed a comparison to another brand or brands of cigarette.

II

For the purposes of Paragraph I of this order:

1. The term 'tar' shall mean the total particulate matter in the mainstream smoke of cigarettes as determined by the testing method employed by the Federal Trade Commission in its testing of the smoke of domestic cigarettes; and

2. The term 'nicotine' shall mean total alkaloids as nicotine in the mainstream smoke of cigarettes as determined by the testing method employed by the Federal Trade Commission in its testing of the smoke of domestic cigarettes.

III

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions or departments.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

FEDERAL TRADE COMMISSION (F.T.C.)

Docket No. C-3547

IN THE MATTER OF THE AMERICAN TOBACCO COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Complaint, January 3, 1995

Decision, January 3, 1995

This consent order prohibits, among other things, a Connecticut-based company from disseminating advertising, for Carlton or any other cigarettes, that represents that consumers will get less tar or nicotine by smoking any number of cigarettes of any of its brands than by smoking one or more cigarettes of any other brand, unless such representations are both true and substantiated by competent and reliable scientific evidence.

Appearances

For the Commission: Shira D. Modell.

For the respondent: Daniel O'Neill and Thomas Beazon, Chadbourne & Park, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that The American Tobacco Company, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent The American Tobacco Company is a Delaware corporation, with its office and

principal place of business located at 281 Tresser Boulevard, Stamford, Connecticut.

PAR. 2. Respondent has manufactured, labelled, promoted, offered for sale, sold, and distributed cigarettes, including Carlton brand cigarettes, to consumers.

PAR. 3. The acts or practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for its Carlton brand cigarettes, including, but not necessarily limited to, the attached Exhibits A-C, which depict ten packs of Carlton brand cigarettes and single packs of other brands of cigarettes, with the tar and nicotine ratings for Carlton and the other brands of cigarettes under each pack. Exhibits A-C contain the following statements:

A. "10 packs of Carlton have less tar than 1 pack of these brands." (Exhibit A.)

B. "A WHOLE CARTON OF CARLTON HAS LESS TAR THAN 1 PACK OF THESE BRANDS." (Exhibit B.)

C. "10 to 1. 10 packs of Carlton have less tar than 1 pack of these brands." (Exhibit C.)

PAR. 5. Through the presentation of the tar of its Carlton product as a numerical multiple, fraction or ratio of the tar of other brands of cigarettes, and/or the visual depiction of ten packs or a carton of Carlton cigarettes versus one pack of the other brands in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondent has represented, directly or by implication, that consumers will get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands of cigarettes depicted in the ads, which are rated as having more than 10 mg. of tar.

PAR. 6. In truth and in fact, consumers will not necessarily get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands of cigarettes depicted in the ads. Although the cigarettes depicted are rated as having more than 10 mg. of tar, those ratings are obtained through smoking machine tests that do not reflect actual smoking, in part because the machines do not take into account such behavior as compensatory smoking. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the presentation of the tar of its Carlton product as a numerical multiple, fraction or ratio of the tar of other brands of cigarettes, and/or the visual depiction of ten packs or a carton of Carlton cigarettes versus one pack of the other brands in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated that representation.

PAR. 8. In truth and in fact, at the time it made the representation set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

BEST AVAILABLE COPY

EXHIBIT B

1 mg. tar, 0.1 mg. nic..
LOWEST SOFT PACK
Carlton
CARLTON IS LOWEST
A whole carton of Carlton has less tar than just 1 pack of these brands.
Marlboro
CAMEL
Winston
L&M
Carlton is lowest in tar and nicotine.
SURGEON GENERAL'S WARNING: Cutting Smoking Now Greatly Reduces Serious Risks to Your Health.

EXHIBIT C

10 to 1
Carlton
10 packs of Carlton have less tar than 1 pack of these brands.
Carlton is lowest in tar and nicotine.
SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent, its attorney and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent The American Tobacco Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 281 Tresser Boulevard, Stamford, Connecticut.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent, The American Tobacco Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any cigarette in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, through the presentation of the tar ratings of any of respondent's brands of cigarettes as a numerical multiple, fraction or ratio of the tar of any other brand of cigarettes, and/or the visual depiction of ten packs or a carton of any of respondent's brands versus one pack of any other brand, directly or by implication, that consumers will get less tar by smoking ten packs of any cigarette rated as having 1 mg. of tar than by smoking a single pack of any other brand of cigarettes that is rated as having more than 10 mg. of tar. For purposes of this order, the term "cigarette" shall be as defined in Section 1332 (1) of Title 15 of the United States Code.

II.

It is further ordered, That respondent, The American Tobacco Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any cigarette in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, through the presentation of the tar or nicotine ratings of any of respondent's brands of cigarettes as a numerical multiple, fraction or ratio of the tar or nicotine ratings of any other brand of cigarettes, and/or the visual depiction of more than one pack of any of respondent's

brands versus one pack of any other brand, directly or by implication, that consumers will get less tar or nicotine by smoking any number of cigarettes (or packs or cartons of cigarettes) of any of respondent's brands than by smoking one or more cigarettes (or packs or cartons of cigarettes) of any other brand, unless such representation is true and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in any objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That presentation of the tar and/or nicotine ratings of any of respondent's brands of cigarettes and the tar and/or nicotine ratings of any other brand (with or without an express or implied representation that respondent's brand is "low," "lower," or "lowest" in tar and/or nicotine) shall not be deemed to constitute a numerical multiple, fraction or ratio and shall not, in and of itself, be deemed to violate paragraph I or II of this order where no more than a single cigarette or pack of respondent's brand is visually depicted versus a single cigarette or pack of any other brand.

IV.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

V.

It is further ordered, That respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations under this order.

VII.

It is further ordered, That respondent shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

State Unfair and Deceptive Practice Acts with Regulatory Authorization Exceptions

Alaska Stat. § 45.50.481 (2004)
Ariz. Rev. Stat. Ann. § 44-1523 (2003)
Ark. Code Ann. § 4-88-101 (2001)
Colo. Rev. Stat. Ann. § 6-1-106 (West 2002)
Conn. Gen. Stat. Ann. § 42-110c (West 2001)
Del. Code Ann. tit. 6, § 2534 (2005)
Fla. Stat. Ann. § 501.212 (West 2006)
Ga. Code Ann. § 10-1-374 (2000)
Haw. Rev. Stat. Ann. § 481A-5 (LexisNexis 2005)
Idaho Code Ann. § 48-605 (2003)
Ind. Code Ann. § 24-5-0.5-6 (LexisNexis 2006)
Iowa Code Ann. § 714.16(14) (West 2003)
La. Rev. Stat. Ann. § 51:1406 (2003)
Me. Rev. Stat. Ann. tit. 10, § 1214 (1997)
Mass. Gen. Laws Ann. ch. 93A, § 3 (West 2006)
Mich. Comp. Laws Ann. § 445.904 (West Supp. 2006)
Minn. Stat. Ann. § 325D.46 (West Supp. 2006)
Neb. Rev. Stat. § 87-304 (1999)
Nev. Rev. Stat. Ann. § 598.0955 (LexisNexis Supp. 2005)
N.M. Stat. Ann. § 57-12-7 (West 2003)
N.Y. Gen. Bus. Law § 349(d) (McKinney 2004)
Ohio Rev. Code Ann. § 4165.04 (West 2001)
Okla. Stat. Ann. § 78-55 (West 2002)
Or. Rev. Stat. § 646.612 (2003)
R.I. Gen. Laws § 6-13.1-4 (2001)
S.C. Code Ann. § 39-5-40 (1985)
S.D. Codified Laws § 37-24-10 (2004)
Tenn. Code Ann. § 47-18-111 (2001)
Tex. Bus. & Com. Code Ann. § 17.49 (Vernon Supp. 2006)
Utah Code Ann. § 13-11-22 (2005)
Va. Code Ann. § 59.1-199 (West 2001)
Wash. Rev. Code Ann. § 19.86.170 (West 1999)
Wyo. Stat. Ann. § 40-12-110 (2005)

STATUTORY PROVISIONS INVOLVED

ILLINOIS COMPILED STATUTES

Chapter 815. BUSINESS TRANSACTIONS

DECEPTIVE PRACTICES

Act 505. Consumer Fraud and Deceptive Business Practices Act

(815 ILCS 505)

505/1. Definitions

505/2. Unlawful practices; construction with Federal Trade Commission Act

* * * * *

505/10a. Action for actual damages

505/10b. Application of Act

505/10c. Waiver or modification

505/11. Severability clause

505/11a. Construction of Act

505/12. Short title

(815 ILCS 505/1) (from Ch. 121 1/2, par. 261)

Sec. 1. (a) The term "advertisement" includes the attempt by publication, dissemination, solicitation or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise and includes every work device to disguise any form of business solicitation by using such terms as "renewal", "invoice", "bill", "statement", or "reminder", to create an impression of existing obligation when there is none, or other language to mislead any person in relation to any sought after commercial transaction;

(b) The term "merchandise" includes any objects, wares, goods, commodities, intangibles, real estate situated outside the State of Illinois, or services;

(c) The term "person" includes any natural person or his legal representative, partnership, corporation (domestic and foreign), company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof;

(d) The term "sale" includes any sale, offer for sale, or attempt to sell any merchandise for cash or on credit.

(e) The term "consumer" means any person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household.

(f) The terms "trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this State.

(g) The term "pyramid sales scheme" includes any plan or operation whereby a person in exchange for money or other thing of value acquires the opportunity to receive a benefit or thing of value, which is primarily based upon the inducement of additional persons, by himself or others, regardless of number, to participate in the same plan or operation and is not primarily contingent on the volume or quantity of goods, services, or other property sold or distributed or to be sold or distributed to persons for purposes of resale to consumers. For purposes of this subsection, "money or other thing of value" shall not include payments made for sales demonstration equipment and materials furnished on a nonprofit basis for use in making sales and not for resale.

(Source: P.A. 83-808.)

(815 ILCS 505/2) (from Ch. 121 1/2, par. 262)

Sec. 2. Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5 (a) of the Federal Trade Commission Act.

(Source: P. A. 78-904.)

* * * * *

(815 ILCS 505/10) (from Ch. 121 1/2, par. 270)

Sec. 10. In any action brought under the provisions of this Act, the Attorney General or the State's Attorney is entitled to recover costs for the use of this State.

(Source: P.A. 84-748.)

(815 ILCS 505/10a) (from Ch. 121 1/2, par. 270a)

Sec. 10a. Action for actual damages.

(a) Any person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual economic damages or any other relief which the court deems proper; provided, however, that no award of punitive damages may be assessed under this Section against a party defendant who is a new vehi-

cle dealer or used vehicle dealer within the meaning of Chapter 5 of the Illinois Vehicle Code or who is the holder of a retail installment contract within the meaning of Section 2.12 of the Motor Vehicle Retail Installment Sales Act, unless the conduct engaged in was willful or intentional and done with evil motive or reckless indifference to the rights of others. Proof of a public injury, a pattern, or an effect on consumers and the public interest generally shall be required in order to state a cause of action under this Section against a party defendant who is a new vehicle dealer or used vehicle dealer within the meaning of Chapter 5 of the Illinois Vehicle Code or who is the holder of a retail installment contract within the meaning of Section 2.12 of the Motor Vehicle Retail Installment Sales Act. Proof of such public injury may be shown by any one of the following factors:

(1) Violation of a statute that has a public interest impact.

(2) Repeated acts prior to the act involving the plaintiff.

(3) Potential for repetition.

(b) Such action may be commenced in the county in which the person against whom it is brought resides, has his principal place of business, or is doing business, or in the county where the transaction or any substantial portion thereof occurred.

(c) Except as provided in subsections (f), (g), and (h) of this Section, in any action brought by a person under this Section, the Court may grant injunctive relief where appropriate and may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs to the prevailing party.

(d) Upon commencement of any action brought under this Section the plaintiff shall mail a copy of the complaint or other initial pleading to the Attorney General and, upon entry of any judgment or order in the action,

shall mail a copy of such judgment or order to the Attorney General.

(e) Any action for damages under this Section shall be forever barred unless commenced within 3 years after the cause of action accrued; provided that, whenever any action is brought by the Attorney General or a State's Attorney for a violation of this Act, the running of the foregoing statute of limitations, with respect to every private right of action for damages which is based in whole or in part on any matter complained of in said action by the Attorney General or State's Attorney, shall be suspended during the pendency thereof, and for one year thereafter.

(f) At any time more than 30 days before the commencement of trial, a party, who is a new vehicle dealer or used vehicle dealer within the meaning of Chapter 5 of the Illinois Vehicle Code or who is the holder of a retail installment contract within the meaning of Section 2.12 of the Motor Vehicle Retail Installment Sales Act and who is defending a claim under this Act, may serve upon the party seeking relief under this Act an offer to allow judgment to be taken against the defending party to the effect specified in the offer with costs then accrued. If within 10 days after service of the offer, the offeree serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service of the notice; the court shall then enter judgment. An offer not accepted shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. When a party seeking relief under this Act does not accept an offer filed with the clerk and served upon the attorney for that party more than 30 days before the commencement of trial and when that party fails to obtain a judgment in an amount more than the total offer of settlement, that party shall forfeit and the court may not award any compensation for attorney's fees and costs incurred after the date of the offer.

(g) At any time more than 30 days before the commencement of trial, a party who is seeking relief under

this Act from a new vehicle dealer or used vehicle dealer within the meaning of Chapter 5 of the Illinois Vehicle Code or from the holder of a retail installment contract within the meaning of Section 2.12 of the Motor Vehicle Retail Installment Sales Act may serve the dealer or holder an offer to allow judgment to be taken against the dealer or holder to the effect specified in the offer with costs then accrued. If within 10 days after service of the offer, the offeree serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service of the notice; the court shall then enter judgment. An offer not accepted shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. When a dealer or holder does not accept an offer filed with the clerk and served upon the attorney for the dealer or holder more than 30 days before the commencement of trial and if the party seeking relief against a dealer or holder obtains a judgment in an amount equal to or in excess of the offer amount, the party seeking relief shall be paid interest on the offer amount at the rate as provided in Section 2-1303 of the Code of Civil Procedure from the date of the offer until the judgment is paid.

(h) At least 30 days prior to the filing of an action under this Section, a party who is seeking relief shall serve a written notice of the nature of the alleged violation and demand for relief upon the prospective party, who is a new vehicle dealer or used vehicle dealer within the meaning of Chapter 5 of the Illinois Vehicle Code or who is the holder of a retail installment contract within the meaning of Section 2.12 of the Motor Vehicle Retail Installment Sales Act, against whom such action will be commenced. Any person receiving such a demand for relief may, within 30 days of service of the demand for relief, submit a written offer of settlement, which offer is to be exclusive of attorney's fees, to the party serving the notice and demand. The party who is seeking relief must certify in any cause of action that the notice and demand was served upon the named defendants and the substance

of their response, if any. If the offer of settlement is rejected in writing by the party who is seeking relief, then, in any subsequent action, the court shall deny any award of attorney's fees and costs requested by the party seeking relief under this Act incurred after the rejection of the written offer of settlement, if the judgment is less than the amount contained within the offer of settlement. All written offers of settlement under this subsection shall be presumed to be offered without prejudice in compromise of a disputed matter.

(Source: P.A. 91-270, eff. 1-1-00.)

(815 ILCS 505/10b) (from Ch. 121 1/2, par. 270b)

Sec. 10b. Nothing in this Act shall apply to any of the following:

(1) Actions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States.

(2) The provisions of "An act to protect trademark owners, distributors, and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trademark, brand or name," approved July 8, 1935, as amended.

(3) Acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement, did not prepare the advertisement, or did not have a direct financial interest in the sale or distribution of the advertised product or service.

(4) The communication of any false, misleading or deceptive information, provided by the seller of real estate located in Illinois, by a real estate salesman or broker licensed under "The Real Estate Brokers License Act",

unless the salesman or broker knows of the false, misleading or deceptive character of such information. This provision shall be effective as to any communication, whenever occurring.

(5) Claims seeking damages for conduct that results in bodily injury, death, or damage to property other than the property that is the subject of the practice claimed to be unlawful.

This item (5) applies to causes of action filed on or after its effective date.

(6) The communication of any false, misleading, or deceptive information by an insurance producer, registered firm, or limited insurance representative, as those terms are defined in the Illinois Insurance Code, or by an insurance agency or brokerage house concerning the sale, placement, procurement, renewal, binding, cancellation of, or terms of any type of insurance or any policy of insurance unless the insurance producer has actual knowledge of the false, misleading, or deceptive character of the information. This provision shall be effective as to any communications, whenever occurring. This item (6) applies to all causes of action that accrue on or after the effective date of this amendatory Act of 1995.

(Source: P.A. 89-7, eff. 3-9-95; 89-152, eff. 1-1-96.)

(815 ILCS 505/10c)

Sec. 10c. Waiver or modification. Any waiver or modification of the rights, provisions, or remedies of this Act shall be void and unenforceable.

(Source: P.A. 93-400, eff. 1-1-04.)

(815 ILCS 505/11) (from Ch. 121 1/2, par. 271)

Sec. 11. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application and to this end the provisions of this Act are severable.

(Source: Laws 1961, p. 1867.)

(815 ILCS 505/11a) (from Ch. 121 1/2, par. 271a)

Sec. 11a.

This Act shall be liberally construed to effect the purposes thereof.

(Source: P. A. 78-904.)

(815 ILCS 505/12) (from Ch. 121 1/2, par. 272)

Sec. 12.

This Act shall be known and may be cited as the "Consumer Fraud and Deceptive Business Practices Act".

(Source: P. A. 78-904.)

ILLINOIS COMPILED STATUTES
Chapter 815. BUSINESS TRANSACTIONS
DECEPTIVE PRACTICES
Act 510. Uniform Deceptive Trade Practices Act
(815 ILCS 510)

510/1. Definitions
510/2. Deceptive trade practices
510/3. Injunctive relief
510/4. Applicability of Act
510/5. Uniformity of interpretation
510/6. Short title
510/7. Severability clause

(815 ILCS 510/1) (from Ch. 121 1/2, par. 311)

Sec. 1. As used in this Act, unless the context otherwise requires:

(1) "article" means a product as distinguished from a trademark, label or distinctive dress in packaging;

(2) "certification mark" means a mark used in connection with the goods or services of a person other than the certifier to indicate geographic origin, material, mode of manufacture, quality, accuracy or other characteristics of the goods or services or to indicate that the work or labor on the goods or services was performed by members of a union or other organization;

(3) "collective mark" means a mark used by members of a cooperative, association or other collective group or organization to identify goods or services and distinguish them from those of others or to indicate membership in the collective group or organization;

(4) "mark" means a word, name, symbol, device or any combination of the foregoing in any form or arrangement;

(5) "person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, unincorporated association, 2 or more of any of the foregoing having a joint or common interest or any other legal or commercial entity;

(6) "service mark" means a mark used by a person to identify services and to distinguish them from the services of others;

(7) "trademark" means a mark used by a person to identify goods and to distinguish them from the goods of others;

(8) "trade name" means a word, name, symbol, device or any combination of the foregoing in any form of arrangement used by a person to identify his business, vocation or occupation and distinguish it from the business, vocation or occupations of others.

(Source: Laws 1965, p. 2647.)

(815 ILCS 510/2) (from Ch. 121 1/2, par. 312)

Sec. 2. Deceptive trade practices.

(a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, the person:

(1) passes off goods or services as those of another;

(2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with or certification by another;

(4) uses deceptive representations or designations of geographic origin in connection with goods or services;

(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a per-

son has a sponsorship, approval, status, affiliation, or connection that he or she does not have;

(6) represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(7) represents that goods or services are of a particular standard, quality, or grade or that goods are a particular style or model, if they are of another;

(8) disparages the goods, services, or business of another by false or misleading representation of fact;

(9) advertises goods or services with intent not to sell them as advertised;

(10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(12) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

(b) In order to prevail in an action under this Act, a plaintiff need not prove competition between the parties or actual confusion or misunderstanding.

(c) This Section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this State.

(Source: P.A. 92-16, eff. 6-28-01)

(815 ILCS 510/3) (from Ch. 121 1/2, par. 313)

Sec. 3. A person likely to be damaged by a deceptive trade practice of another may be granted injunctive relief upon terms that the court considers reasonable. Proof of monetary damage, loss of profits or intent to deceive is not required. Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source.

Costs or attorneys' fees or both may be assessed against a defendant only if the court finds that he has wilfully engaged in a deceptive trade practice.

The relief provided in this Section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this State.

(Source: P.A. 81-1509.)

(815 ILCS 510/4) (from Ch. 121 1/2, par. 314)

Sec. 4. This Act does not apply to:

(1) conduct in compliance with the orders or rules of or a statute administered by a Federal, state or local governmental agency;

(2) publishers, broadcasters, printers or other persons engaged in the dissemination of information or reproduction of printed or pictorial matter who publish, broadcast or reproduce material without knowledge of its deceptive character; or

(3) actions or appeals pending on the effective date of this Act.

Subsections (2) and (3) of Section 2 do not apply to the use of a service mark, trademark, certification mark, collective mark, trade name or other trade identification that was used and not abandoned before the effective date of this Act, if the use was in good faith and is otherwise lawful except for this Act.

(Source: Laws 1965, p. 2647.)

(815 ILCS 510/5) (from Ch. 121 1/2, par. 315)

Sec. 5. This Act shall be construed to effectuate its general purpose to make uniform the law of those states which enact it.

(Source: Laws 1965, p. 2647.)

(815 ILCS 510/6) (from Ch. 121 1/2, par. 316)

Sec. 6. This Act may be cited as the Uniform Deceptive Trade Practices Act.

(Source: Laws 1965, p. 2647.)

(815 ILCS 510/7) (from Ch. 121 1/2, par. 317)

Sec. 7. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

(Source: Laws 1965, p. 2647.)

15 U.S.C. § 45 provides:

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless –

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect –

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition

for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a

review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original

order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28.

(d) Jurisdiction of court

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Exemption from liability

No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order

An order of the Commission to cease and desist shall become final –

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).

(2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by –

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending.

(3) For purposes of subsection (m)(1)(B) of this section and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed –

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed –

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) Modification or setting aside of order by Supreme Court

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) Modification or setting aside of order by Court of Appeals

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such peti-

tion has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Rehearing upon order or remand

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) "Mandate" defined

As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

***(l)* Penalty for violation of order; injunctions and other appropriate equitable relief**

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except

that in case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice –

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section, each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) of this section that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a) of this section.

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

(n) Standard of proof; public policy considerations

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is un-

fair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

28 U.S.C. § 1257 provides:

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

July 25, 2006

Mr. Robert L. King
701 Market Street
Suite 350
St. Louis, MO 63101

Re: Sharon A. Price, et al.
v. Philip Morris Incorporated
Application No. 06A87

Dear Mr. King:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on July 25, 2006 extended the time to and including September 5, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
Ruth Jones
Case Analyst

[attached notification list omitted]

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
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August 28, 2006

Mr. David C. Frederick
Kellogg, Huber, Hansen, Todd, Evans & Figel,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: Sharon A. Price, et al.
v. Philip Morris Incorporated
Application No. 06A87

Dear Mr. Frederick:

The application for a further extension of time in the above-entitled case has been presented to Justice Stevens, who on August 28, 2006 extended the time to and including October 2, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/ RUTH JONES
Ruth Jones
Case Analyst

[attached notification list omitted]

FILED
OCT 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 06-465

IN THE

Supreme Court of the United States

SHARON PRICE AND MICHAEL FRUTH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Illinois Supreme Court held that the Illinois Consumer Fraud and Deceptive Business Practices Act barred any claims brought under that statute arising out of respondent's use of the descriptors "lights" and "lowered tar and nicotine" in the labeling of its cigarettes. In so holding, the Illinois court stated that it "resolved the present case entirely on the basis of state law by construing and applying an exemption clause in a state statute." Pet. App. 87a.

The only question presented by this case is the following state-law issue: Whether the Illinois Supreme Court erred in interpreting the state-law statutory exemption to bar petitioners' state-law claims.

CORPORATE DISCLOSURE STATEMENT

Respondent makes the following corporate disclosure statements pursuant to Supreme Court Rule 29.6:

Respondent Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc.[1] Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock.

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[1] Altria Group, Inc. (identified in plaintiffs' complaint by its former name, Philip Morris Companies Inc.) was dismissed from this lawsuit on January 7, 2003.

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INTRODUCTION

In this case, a trial court in Madison County, Illinois entered a $10.1 billion judgment against respondent Philip Morris USA Inc. ("PM USA") for allegedly violating the Illinois Consumer Fraud and Deceptive Business Practices Act ("CFA") by using the descriptors "lights" and "lowered tar and nicotine" on certain brands of cigarettes. The damages award was not designed to compensate the class for any personal injuries; instead, accepting petitioners' "novel" damages theories, Pet. App. 85a, the trial court ordered a refund of 92.3% of the purchase price (including sales and excise taxes) of every package of Marlboro Lights and Cambridge Lights (together, "Lights") sold in Illinois over the course of three decades. The Illinois Supreme Court *sua sponte* granted a direct appeal from the trial court, reversed, and ordered judgment entered in favor of PM USA, on the ground that plaintiffs' state-law claims were barred by a state statutory exemption contained in the CFA.[2]

This Court has no jurisdiction to review this decision. In reversing the trial court's $10.1 billion judgment, the Illinois Supreme Court held that section 10b(1) of the CFA provides a *state-law* defense where the conduct challenged under the CFA was "specifically authorized by the laws administered

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[2] This was the second time in six months that the Illinois Supreme Court reversed a billion-dollar class action judgment imposed by southern Illinois trial courts, which became a magnet for class action litigation after a $1 billion judgment was entered against State Farm in 2002 in a nationwide class action. *See Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), *cert. denied*, -- U.S. --, 126 S. Ct. 1470 (2006); *see also, e.g.*, Lester Brickman, *Anatomy of a Madison County (Illinois) Class Action: A Study of Pathology*, 6 Civil Justice Report (Aug. 2002), *available at* http://www.manhattan-institute.org/html/cjr_6.htm (finding that Madison County had become third nationwide in the number of class actions filed).

by any regulatory body," such as the Federal Trade Commission ("FTC"). 815 ILCS 505/10b(1) (2005).[3] The court held that, as a matter of Illinois law, the "specific authorization required to trigger the exemption of section 10b(1) does not require formal rulemaking" and, indeed, "need not be express." Pet. App. 86a. Applying that definition to the evidence presented at trial, the court concluded that through its "regulatory activity, including the resolution of an enforcement action by means of a consent order," the FTC had "implicitly provided" PM USA with the kind of authorization for its use of the descriptors that was necessary under state law to trigger the exemption. *Id.*

To remove any possible doubt about the basis for its decision, the Illinois Supreme Court stated unequivocally that "[w]e have resolved the present case ***entirely on the basis of state law*** by construing and applying an exemption clause in a state statute." *Id.* 87a (emphasis added); *see also, e.g., id.* (interpretation of the statutory exemption "is not dependent on the intent of Congress," but rather "the intent of the Illinois General Assembly"). The question decided by the court was quintessentially one of state legislative policy concerning the scope of a state-law statutory defense. As a result, the decision does not present an issue of federal law within this Court's *certiorari* jurisdiction. *See* 28 U.S.C. § 1257(a).

Even if the case were somehow within this Court's jurisdiction, it still would fail to present any "compelling reasons" warranting review. *See* Sup. Ct. R. 10. The "conflict" petitioners rely upon simply does not exist. Not one of the supposedly conflicting federal cases petitioners cite arose in the context of a state consumer protection statute, let

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[3] The court also held that petitioners' Deceptive Practices Act claims were barred under a parallel provision, 815 ILCS 510/4, which exempts from liability conduct that is "in compliance with the orders" of an agency. Pet. App. 87a. The analysis for both provisions is the same.

alone involved the proper interpretation of the CFA or its statutory exemption. Nor does the Illinois Supreme Court decision conflict with any of the cases petitioners cite. For example, petitioners argue that the decision below somehow conflicts with federal decisions holding that a consent decree is not enforceable against a non-party. Far from taking a conflicting view, the Illinois Supreme Court *agreed* that a "consent order may be enforced only against the party who agreed to the terms of the order," Pet. App. 67a, but held that that principle did not end the inquiry under state law. That conclusion, which was based entirely on the court's interpretation of the CFA, does not conflict with any federal court decision.[4]

STATEMENT OF THE CASE

A. The Complaint

In February 2000, petitioners filed their initial class action complaint in the Circuit Court for Madison County on behalf of all persons who purchased even a single pack of Lights in Illinois since Marlboro Lights were first marketed in 1971. Petitioners alleged that PM USA had violated the CFA and had been unjustly enriched by misrepresenting Lights as "light" and as having "lowered tar and nicotine" (and thus

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[4] In fact, as demonstrated below, petitioners have waived the argument that they advance in their Petition -- *i.e.*, that federal law governs the application of the CFA's exemption. That is another reason to deny the Petition. *See, e.g., Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 506 U.S. 153, 162 n.12 (1993) (finding that issues not raised below were waived); *Auer v. Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument "inadequately preserved in the prior proceedings").

presenting a reduced risk of disease) in comparison to "regular" or full-flavor cigarettes. *See* C.6, 11.[5]

Petitioners did not dispute that Lights have always yielded less tar and nicotine than full-flavor cigarettes when measured pursuant to the method mandated by the FTC (the "FTC Method"). Petitioners contended, however, that the FTC Method is flawed because it uses a machine that smokes cigarettes according to a strict set of standardized conditions and does not take into account that smokers may alter the amount of tar and nicotine actually inhaled by changing their smoking behavior. C.42432-33; C.15810. For example, if a smoker switches from smoking full-flavor cigarettes to smoking Lights and "compensates" -- by, for example, smoking more cigarettes or taking deeper or more frequent puffs -- the smoker may receive more tar and nicotine than indicated by the FTC's measurements. C.6; C.11; C.42437-38.[6] Petitioners contended that Lights smokers compensated

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[5] Citations to "C.xx" are to documents in the common law record on appeal, citations to "R.xx" are to transcript record cites, and citations to "MIPM-xx" are to exhibits in the record on appeal.

[6] The FTC was well aware of this limitation of its method at the time it adopted the method in 1967. In fact, at the time, the FTC issued a press release advising that it "has not attempted to gauge the test to the amount of smoke, or tar and nicotine, which the 'average' smoker will draw from any particular cigarette" and that "the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker." MIPM-7147. Nonetheless, the FTC decided to use this method because the "Commission consider[ed] it most important [to have] test results . . . based on a reasonable standardized method . . . capable of being presented to the public based on a uniform method used by all laboratories." *Id.* In fact, in 1970, the FTC went a step further and compelled the tobacco companies (including PM USA) to agree to include FTC-measured tar and nicotine yields in all advertising with a disclosure that the yields were on "av. per cigarette by FTC Method." *See, e.g.*, MIPM-7030. The FTC also made clear that it would be deceptive to advertise any yield measurement not based on the FTC Method, even if the measurements were higher than

to such an extent that they all inhaled as much as tar and nicotine as they would have with full-flavor cigarettes. C.6, 11; C.42437-38.

Petitioners did not seek personal injury damages. Instead, they sought purported "economic" damages on the ground that they paid too much for the perceived health benefits associated with Lights -- even though it was undisputed that Lights have always been priced the same as their full-flavor counterparts. C.13. Based on a 276-person internet survey, petitioners claimed that, if class members could have chosen a truly "safer" cigarette, they would have required on average a 92.3% discount before purchasing Lights. Pet. App. 192(a).[7] Notably, 17 of the 23 class members who testified at trial continued to purchase Lights -- without requiring any reduction in price -- even after participating in the lawsuit and being informed about the claimed deception.[8]

Before trial, PM USA sought summary judgment on several grounds, arguing (among other things) that it was exempt from any CFA claim because its use of the descriptors had been "specifically authorized" by the FTC within the meaning of section 10b(1). Pet. App. 30a-31a. Petitioners claimed that the FTC's informal regulatory activities were insufficient

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those produced by the FTC Method. *In re Lorillard*, 92 F.T.C. 1035 (1978).

[7] Petitioners used an internet survey in which smokers "were asked to assume that Marlboro Lights were more hazardous than full-flavor cigarettes and to imagine the existence of a Marlboro Light that was identical in all other respects to the current product, except that it was truly safer to smoke." Pet. App. 42a. The smokers "were then asked to state how much of a discount would be required to cause them to purchase the more hazardous product if the safer version were actually available." *Id.*

[8] *See* R.3284; R.4528-30; R.10285; R.7201-02; R.7304; R.7917; R.10027; R.10075; R.10161, 10181-82; R.10297, 10302; R.10344; R.10448; R.10869; R.10937, 10956-58; R.10984; R.11618-21; R.5718-19.

as a matter of Illinois law to satisfy the statutory requirement that conduct be "specifically authorized." *Id.* at 31a. The trial court stayed PM USA's motion for summary judgment, finding that issues of material fact existed and reserving judgment on these defenses for trial. C.20753-55.

B. Trial

A class was certified over PM USA's objections. On the first day of trial, in January 2003, petitioners voluntarily dismissed their common law unjust enrichment claim, leaving only their CFA claim. Because there is no right to a jury trial on a CFA claim, petitioners' claims were tried to the court.

At trial, PM USA introduced the expert testimony of Dr. John Peterman on the issue of the FTC's regulatory activities with respect to tar and nicotine measurements, disclosures, and marketing. *See generally* R.06260-6450; 6454-6526; 6514-6690; 6694-6758. He opined that PM USA's marketing of Lights at all times complied with the policies and objectives of, and was specifically authorized by, the FTC's regulatory program. *See, e.g.*, R.6471. Plaintiffs did not offer any expert to rebut Dr. Peterman's testimony.

Among other things, Dr. Peterman testified about the variety of tools -- including consent decrees -- that the FTC uses to regulate industries informally. He explained that the FTC frequently brings a complaint against a single company -- and seeks to reach a consent decree with that company -- in order to "prov[ide] guidance to other firms in the industry." R.6329.

Dr. Peterman testified about two consent decrees entered into by the FTC that he opined authorized the use of descriptors such as "lights" and "lowered tar and nicotine." *First*, in 1969, the FTC brought an action against another cigarette manufacturer, American Brands, charging it with making unsubstantiated claims that certain of its brands were

"low in tar when in fact they ranked really relatively high in comparison to many other brands." R.6466. Ultimately, the action was resolved through a consent decree, in which the FTC approved the "use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms" to describe cigarettes so long as the terms were accompanied by "a clear and conspicuous disclosure of . . . [t]he tar and nicotine content in milligrams in the smoke produced by the advertised cigarette," as measured by the FTC Method. MIPM-7293; *see also* R.6467-68. Consistent with the FTC's policy for all proposed consent decrees, 16 C.F.R. § 2.34, before the consent decree was finalized, it was published for public notice and comment. MIPM-7032.

Second, in 1995, the FTC entered into another consent decree with American Tobacco that reaffirmed its policy permitting descriptors. Again, the FTC published this consent decree for notice and comment before it was finalized. *See* 59 Fed. Reg. 51,980 (Oct. 13, 1994) (MIPM-7301); MIPM-7299. In this consent decree, the FTC indicated again that it would permit representations that a brand is "'low,' 'lower,' or 'lowest' in tar and/or nicotine," so long as the claim was substantiated by FTC Method results. MIPM-7299 at 3.

These consent orders were not the only evidence of the FTC's authorization of the use of lights descriptors. For example, in 1967, the FTC issued its "enforcement policy" with respect to "representations relating to tar and nicotine content of cigarettes," explaining that the FTC would *not* challenge representations that were "fully substantiated" by FTC Method results. MIPM-7366. Similarly, during its investigation of another brand of low tar cigarette not at issue here (Barclay), the FTC indicated that it would be permissible for the brand to be advertised as "low tar" since "the FTC yield in terms of tar for Barclay was estimated within the range of 3 to 7 milligrams of tar." R.6472. And in 1992, at the behest of a consumer group, the FTC launched an

investigation focused specifically on whether terms like "lights" and "low tar" were deceptive and should be banned -- ultimately deciding to take no action. *See* R.6503-11. The evidence also indicated that the FTC was currently considering whether to revise its policies regarding descriptors. 62 Fed. Reg. 48,158 (Sept. 12, 1997) (MIPM-7123); Pet. App. 23a.

At the close of the evidence, both parties submitted proposed findings of facts and conclusions of law. The trial court adopted the petitioners' findings of fact and conclusions of law verbatim, including typographical errors. The judge found that all of the estimated 1.14 million class members had interpreted the descriptors "lights" and "lowered tar and nicotine" to convey a message of lower risk, that this message was relied on to some degree by every class member, that compensation was "complete" so that not a single class member had received less tar and nicotine, and that each class member had suffered an "economic loss" of 92.3% of the purchase price of Lights. Pet. App. 167a-213a.

The trial court awarded $7.1 billion in compensatory damages, including over $2 billion in prejudgment interest. Pet. App. 194a. The court then awarded an additional $3 billion in punitive damages. *Id.* And the judge allocated approximately $1.775 billion of the award to petitioners' counsel for fees and expenses. *Id.* at 213a-214a. Assuming that a significant portion of the award would go unclaimed, the court provided for the distribution of the unclaimed award on a *cy pres* basis to law schools, domestic violence programs, legal aid services, and the American Cancer Society. *Id.* at 214a-215a.

In finding for petitioners, the trial court rejected PM USA's arguments that the use of the challenged descriptors was "specifically authorized" by the FTC within the meaning of the CFA. *Id.* at 202a. The court concluded that "no

regulatory body had ever required (or even specifically approved) the use" of the terms "lights" and "lowered tar and nicotine." *Id.*

C. The Illinois Supreme Court Decision

The Illinois Supreme Court *sua sponte* granted a direct appeal (bypassing review in the intermediate appellate court) and reversed the trial court's judgment. The court held that petitioners' claims were barred by section 10b(1), which precludes a CFA claim if the "[a]ctions or transactions [at issue are] specifically authorized by laws administered by any [federal] regulatory body or officer acting under statutory authority of this State or the United States." 815 ILCS 505/10b(1). The court recognized that "the [Illinois] legislature clearly intended for certain actions . . . to be exempt from liability . . . without regard to the possible merits of the asserted claim." Pet. App. 59a.

The Illinois Supreme Court held that whether the FTC had "specifically authorized" the use of the challenged descriptors depended on the proper interpretation of the CFA. *Id.* at 56a-58a. The court explained that, in determining whether the statutory exemption "operates to bar the action at issue," it must examine "the language of the statute, which is the most reliable indicator of the legislature's objectives." *Id.* at 57a. The court concluded that the plain language indicated that the "specific authority . . . may be either express or implied," and that "formal agency rulemaking is not required" for authorization under state law. *Id.* This interpretation was also "consistent with apparent legislative intent and with the public policy embodied in the Consumer Fraud Act." *Id.* at 58a.

The Illinois Supreme Court concluded further that this interpretation was confirmed by its own precedents. *See id.* at 65a-67a. After a lengthy examination of "Illinois case law," it determined that its precedents established several

"propositions that are relevant to the present case," including that "a regulatory body may specifically authorize conduct by regulated entities without engaging in formal rulemaking" and that the authorization "need not be express." *Id.* at 66a-67a.

Only after its analysis of the plain language, legislative intent, and prior Illinois case law did the Illinois Supreme Court turn to "other authorities," such as "the FTC's own published materials" and federal decisions. *Id.* at 67a. These materials "support[ed]" the court's "conclusion that specific authorization for the use of the disputed descriptors may be found in consent orders rather than in formally promulgated trade regulation rules of the FTC." *Id.* at 79a.

Finally, the Illinois Supreme Court determined that the 1971 and 1995 consent decrees (described above) -- when considered in conjunction with the entire FTC history of regulating tar and nicotine measurements, disclosures, and marketing, *see id.* at 2a-23a -- provided authorization for the use of the lights descriptors. The court concluded that the 1971 consent decree, for purposes of the state exemption, "specifically authorize[d] all United States tobacco companies to utilize the words 'low,' 'lower,' 'reduced' or like qualifying terms, such as 'light,' so long as the descriptive terms are accompanied by a clear and conspicuous disclosure" of FTC-measured tar and nicotine yields. *Id.* at 79a. Further, "the FTC reiterated this authorization in the 1995 consent order." *Id.* "Thus," the court held, "plaintiffs' claim is barred by section 10(b)(1) of the Consumer Fraud Act." *Id.* at 80a.

Two of the justices in the majority filed a specially concurring opinion explaining that they also would have reversed the judgment on the ground that petitioners' claims failed as a matter of law because petitioners "sustained no actual [economic] damages." *Id.* at 98a. As the justices

noted, "[t]here was no price disparity between light cigarettes and their full-flavored counterparts," which meant that "the net change in consumers' economic position" as a result of the alleged fraud was "zero." *Id.* at 91a, 95a. The majority opinion echoed the concurring justices' view, expressing "grave reservations about the novel approach to the calculation of damages that was offered by the plaintiffs and accepted by the circuit court." *Id.* at 85a.

Although the majority found it unnecessary to decide the issue, it also explained that it had serious reservations about the propriety of the trial court's decision to certify a class. In particular, the court noted that the trial court had not found, as Illinois Supreme Court precedent required, that all of the class members had actually been deceived by the descriptors in question. *Id.* at 82a-83a. Nor had it found that such alleged deception was the "but for" cause of each purchasing decision. *Id.* at 83a. The court expressed skepticism as to "whether it can reasonably be said that deception created by the words 'Lights' and 'lowered tar and nicotine' on packages of Marlboro Lights and Cambridge Lights was the 'but for' cause of millions of purchasing decisions made over a period of some 30 years by the 1.14 million members of the plaintiff class." *Id.* at 84a. The court also expressed skepticism about the trial court's finding that all members of the class had compensated so that none of them had received less tar and nicotine. *Id.* at 85a. While not resolving these issues, the court pointedly noted its "reservations about the existence of individual issues that might make class certification inappropriate." *Id.*

REASONS FOR DENYING THE PETITION

I. THIS COURT HAS NO JURISDICTION TO GRANT THE PETITION

This Court's jurisdiction to review final state court judgments is constrained by 28 U.S.C. § 1257(a). Under section 1257(a), the Court may issue a writ of certiorari to a state supreme court only when the "state court determination[] . . . rest[s] upon federal law." *Oregon v. Guzek*, -- U.S. --, 126 S. Ct. 1226, 1229 (2006); *see also Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our only power over state court judgments is to correct them to the extent that they incorrectly adjudge federal rights."); *Henry v. Mississippi*, 379 U.S. 443, 447 (1965) ("[W]e have no power to revise judgments on questions of state law.").

The petition here presents only a state law question and therefore falls outside this Court's jurisdiction. The Illinois Supreme Court held that the FTC's actions -- none of which was in dispute[9] -- "specifically authorized" PM USA's use of the descriptors within the meaning of the state statutory exemption, thereby giving PM USA a state law defense. The court found that section 10b(1) does not require formal rulemaking or official definitions or any other type of express approval. Pet. App. 57a. Rather, a consent order allowing one member of the industry to use descriptors fits within the meaning of "authorization" under section 10b(1) for other similarly situated industry members. *Id.* at 66a, 72a.

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[9] *See* Pet. App. 50a-51a ("the actions of the FTC with relation to the use of [descriptors] in cigarette advertising and labeling are a matter of public record" and "essentially undisputed"). Even if there were such a factual dispute, it would not be worthy of this Court's review. *See, e.g.*, Sup. Ct. R. 10 (certification "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

In so holding, the Illinois Supreme Court made clear that it was relying on state, not federal, law. Throughout its opinion, the court expressed its objective as "to ascertain and give effect to the intent of the legislature." *Id.* at 56-57a. The court therefore based its decision on its reading of the plain language of the state statute, *id.* at 57a-58a, other indicia of the Illinois legislature's intent, *id.* at 58a-59a, and its own prior decisions, *id.* at 60a-67a. Based on this *state-law* authority, the court concluded that the authorization need not "be express" or "formal." *Id.* at 66a.[10]

Finally, to put aside any doubt about the matter, the court took pains to declare unequivocally that it was deciding the case based solely on state law and not on federal law:

> ***We have resolved the present case entirely on the basis of state law by construing and applying an exemption clause in a state statute*** . . . . Operation of [the statute] is not dependent on the intent of Congress. ***Rather it is dependent on the intent of the Illinois General Assembly*** to allow regulated entities to engage in commercial conduct that might otherwise be alleged to be fraudulent or deceptive without the risk of civil liability, so long as that content is specifically authorized by the regulatory body.

Id. at 87a (emphases added).

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[10] The court found that its broad interpretation of "specifically authorized" satisfied the Illinois legislature's goal of channeling objections to agency policy and practice into the political process rather than into the courts: "Parties who desire to bring about change in agency policies or rules can take their complaints to the agency itself and can participate in the formal rulemaking process. If their concerns are not addressed by the agency, they may seek assistance from their legislators . . . ." *Id.* at 59a.

This statement "indicates clearly and expressly that" the state court's decision was independent of federal law. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (In these circumstances "we, of course, will not undertake to review the decision."). Given the clarity with which the Illinois Supreme Court relied on state law in interpreting section 10b(1), it is undeniable that, no matter how this Court interprets federal law, the Illinois Supreme Court's decision would remain the same. This Court therefore has no jurisdiction to review that determination. *See, e.g.*, *Herb*, 324 U.S. at 125-26; *Henry*, 379 U.S. at 447; *Long*, 463 U.S. at 1041; *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) ("Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory."); *Sochor v. Florida*, 504 U.S. 527, 533-34 (1992) ("[T]his Court lacks jurisdiction . . . if the state court's opinion indicates clearly and expressly" reliance on a "state ground.") (internal quotation marks omitted); *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990) ("When a state-court decision is clearly based on state law . . . we will not review the decision."); *Illinois v. Gates*, 462 U.S. 213, 218 (1983) (Court has "no jurisdiction unless a federal question has been both raised and decided in the state court below").

Anticipating this problem, petitioners cite to a single, 64-year old decision -- *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942) -- in support of this Court's jurisdiction. *See* Pet. at 27-30.[11] However, *Standard Oil* only confirms that there is no jurisdiction here.

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[11] Commentators have criticized *Standard Oil*'s exercise of jurisdiction as resting "on shaky theoretical ground." Wright & Kane, 20 *Fed. Prac. & Proc. Deskbook* § 114 (2006); *see also, e.g.*, Robert J. Greene, *Hybrid State Law in the Federal Courts*, 83 Harv. L. Rev. 289, 322 (1969) ("On balance it would seem best to discard some of the broader implications of *Standard Oil*.").

Standard Oil involved a decision by the California Supreme Court construing whether a state statutory tax exemption for the U.S. government applied to the U.S. Army Post Exchanges. This Court recognized that, if the California Supreme Court's "construction of [the state statute] had been based purely on local law, this construction would have been conclusive." 316 U.S. at 483. However, in that case, "the court did not rely upon the law of California," but rather based its decision "upon its determination concerning the relationship between post exchanges and the government of the United States, a relationship which is controlled by federal law." *Id.*

By contrast, here, the Illinois Supreme Court was explicit that its "construction" was "based purely on local law" and that it was "rely[ing] upon the law of [Illinois]." There was no "determination concerning [a] relationship . . . controlled by federal law." *Id.* Therefore, even under *Standard Oil*, the state court's "construction" is "conclusive."

Indeed, it is not clear how the Court would even go about formulating a "federal question" it could decide in this case. Petitioners claim that the question is whether, as a matter of federal law, consent decrees create a safe harbor immunizing the conduct of non-parties from state laws. But that is neither the issue here nor the issue decided by the Illinois Supreme Court.[12] To the contrary, the court was applying its own interpretation of the Illinois requirement of "specific authorization," which it held could include both informal and implicit authorization based on a variety of regulatory conduct, including the issuance of consent decrees. Nowhere in this calculus is there even a subsidiary federal question.

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[12] Notably, petitioners below did not even cite any of the federal authorities upon which they rely upon now in their effort to seek this Court's review. *See infra* at 25-26.

Petitioners emphasize that the Illinois Supreme Court looked to "federal authorities and FTC statements" in addition to state-law sources. Pet. at 29. However, mere citation to federal materials does not create a federal issue subject to this Court's jurisdiction. If that were true, virtually any state law issue could be converted to a federal one because state courts routinely cite federal authorities. *See Long*, 463 U.S. at 1041. For that very reason, this Court has indicated that a court wishing "merely to rely on federal precedents as it would on the precedents of all other jurisdictions . . . need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel that the result the court has reached." *Id.* Here, that is exactly what the court did when it stated that it was merely looking at these federal materials as "additional authority," Pet. App. 67a, and that these authorities in no way compelled the result the court reached: "We have resolved the present case entirely on the basis of state law by construing and applying an exemption clause in a state statute." *Id.* at 87a; *see also id.* at 79a (reading federal authorities only "in conjunction with Illinois law").[13]

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[13] The limited nature of the Illinois Supreme Court's use of federal authorities is further illustrated by its treatment of *Watson v. Philip Morris Cos.*, 420 F.3d 852 (8th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3588 (U.S. Apr. 7, 2006) (No. 05-1284) & *invitation to U.S. Solicitor General to participate pending* (U.S. May 22, 2006). The Illinois court specifically noted the fundamental difference between *Price* and *Watson* by stating that it was relying on *Watson* only for its factual discussion of the FTC's regulation of cigarette advertising: "The issue addressed by the *Watson* court -- whether removal to federal court was proper -- has no bearing on the present case." Pet. App. 79a. *Watson* addresses whether, based on the entire history of FTC regulatory activity, PM USA was acting under FTC direction for purposes of a federal statute -- the federal officer removal provision. *See id.* at 77a-79a. By contrast, the issue here is whether two consent decrees (considered in the context of the FTC's five-decade regulatory history) provide authorization within the meaning

In sum, there is no federal question here that would give this Court jurisdiction. The Illinois legislature and Illinois courts are clearly free to decide, based on the state's own policies, whether consent decrees constitute the kind of "authorization" that satisfies section 10b(1) of the CFA, regardless of federal law. For this reason, this Court lacks jurisdiction to grant *certiorari* review.

II. EVEN IF THIS COURT HAD JURISDICTION, THIS CASE WOULD NOT WARRANT REVIEW

Even if this Court somehow had jurisdiction over this case, it still would not be certworthy. Not one of the cases petitioners cite as creating a "conflict" has anything to do with the CFA's statutory exemption or the meaning of the statutory phrase, "specific authorization." All of petitioners' cases focus on issues of federal administrative law having nothing to do with the dispositive state-law issue here -- the scope of the CFA's section 10b(1) defense.[14]

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of an Illinois state statute. In short, although the two decisions may discuss the same history of FTC regulation, the cases involve fundamentally different legal issues and standards.

[14] Petitioners note that a number of states have exemptions like section 10b(1) of the CFA and suggest that there should be consistency in the application of those exemptions. Pet. at 26. But each state is clearly free to decide the scope of its own exemption based on its own legislative policy. Two federal district courts have found that similar statutory exemptions in Louisiana and Michigan also preclude claims virtually identical to those asserted here. *See Sullivan v. Philip Morris USA Inc.*, No. 03-796, 2005 WL 2123702, at *9 (W.D. La. Aug. 31, 2005), *appeal granted on other grounds*, Nos. 06-1, 06-30311 (5th Cir. Mar. 27, 2006); *Flanagan v. Altria Group, Inc.*, No. 05-71697, 2005 WL 2769010, at *2, 7 (E.D. Mich. Oct. 25, 2005). A Massachusetts court reached the opposite conclusion under its state's exemption. *See Aspinall v. Philip Morris, Cos., Inc.*, No. 98-6002, slip op. (Mass. Super. Ct. Aug. 9, 2006) (submitted by the trial court for interlocutory review).

Furthermore, the alleged "conflicts" are "conflicts" only in petitioners' imagination. The authorities upon which petitioners rely reflect a *consistent* body of case law regarding federal consent decrees -- case law that does not conflict in any way with the Illinois Supreme Court decision. As demonstrated below, circuit courts without exception recognize that consent decrees are flexible tools that agencies often use to provide direction and set agency policies with respect to a regulated industry. The Illinois Supreme Court's recognition of this fact is entirely consistent with federal court decisions. Nor do federal court holdings that consent decrees are enforceable only against the parties to the decree create any conflict with the decision below. The Illinois Supreme Court expressly *agreed* with this principle, but held as a matter of state law that it did not define the scope of the section 10b(1) defense. Finally, nothing in the Illinois Supreme Court's holding is inconsistent with the holdings of this Court.

A. No Conflict Exists As To Whether Agencies Can Use Consent Decrees To Provide Direction And Set Regulatory Policy.

Petitioners do not dispute that consent decrees can provide "specific authorization" at least to the actual parties to the decree. At most, plaintiffs contend that there is a circuit split as to whether federal agency consent decrees can provide implicit authorization to other participants in the same industry that were not party to the consent decree. Pet. at 11-14.

No such circuit split exists. Rather, courts -- including this Court -- have recognized in a variety of contexts that federal agencies often set industry-wide policies through administrative adjudications and other informal means, including advisory letters, staff interpretations, and consent decrees. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S.

267, 294 (1974) ("Adjudicated cases may and do . . . serve as vehicles for the formulation of agency policies which are applied and announced therein.") (citation and internal quotations omitted); *Cent. Tex. Tel. Co-op, Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005) ("Agencies often have the choice of proceeding by adjudication, rather than rulemaking . . . . Orders handled down in adjudications may establish broad legal principles."); *San Francisco Police Officers' Ass'n v. City & County of San Francisco*, 812 F.2d 1125, 1129 (9th Cir. 1987) (consent decree establishes policies that should be afforded preemptive weight), *op. amended and superseded by*, 869 F.2d 1182 (9th Cir. 1988).[15]

Indeed, the FTC is particularly accustomed to setting policy and authorizing conduct by the use of consent orders. *FTC v. Mandel Bros. Inc.*, 359 U.S. 385, 391 & n.6 (1959); *see also, e.g., Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 997-99 (D.C. Cir. 1973) (explaining FTC's history of using informal means to regulate); *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 39 (2d Cir. 1990) (FTC consent decree establishes policies that should be afforded preemptive weight); *Alaska v. O'Neill Investigations, Inc.*, 609 P.2d 520, 529 (Alaska 1980) (FTC consent decrees constitute "administrative interpretation" with "precedential value"); *Schubach v. Household Fin. Corp.*, 376 N.E.2d 140, 141 (Mass. 1978) (FTC's policy inferred from complaints and cease and desist orders). The FTC has even superimposed the procedural hallmark of rulemaking -- notice and comment -- on the

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[15] Petitioners argue that *Bell Aerospace* demonstrates that "agencies often choose adjudication to avoid formulating universal standards." Pet. at 23. Although this is true, it is only half the story and ignores that adjudication is another flexible tool in an agency's arsenal in regulating an industry. As this Court recognized in *Bell Aerospace*, although an agency *can* use adjudication to avoid formulating universal standards, an agency also is "not precluded from announcing new principles in an adjudicative proceeding." 416 U.S. at 294.

process for formulating consent decrees. *See* 16 C.F.R. § 2.34 (requiring notice and comment for all proposed consent decrees). The FTC's use of such procedures demonstrates its recognition that consent decrees are flexible tools and can be used to set policy for industries as a whole -- not just the participants involved in the proceeding.[16] In fact, some courts have recognized that, when an agency permits one member of an industry to engage in certain conduct in a consent decree, the agency cannot prohibit similarly situated competitors from engaging in the same conduct. *See, e.g., Ford Motor Co. v. FTC*, 547 F.2d 954, 959-61 (6th Cir. 1976) (holding that the FTC must afford the same treatment to one competitor that it has allowed to another competitor in an earlier consent decree).[17] The Illinois Supreme Court's

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[16] There is ample support in the record for the conclusion that FTC officials viewed consent decrees and other informal actions as the means by which to set industry-wide policies. *See, e.g.*, Pet. App. 78-79a (describing former FTC Chairman Daniel Oliver's statement that the FTC prefers "informal regulation via the use of enforcement actions and consent orders rather than formal rulemaking"); *see also, e.g.*, Charles H. Koch, Jr., 2 Administrative Law & Practice § 5.43[2] (1997) ("consent orders . . . do express a good deal of the law of the agency. A practitioner will pay as much attention to consent orders as to adjudicated decision."); 2 Federal Procedure § 2:71 (Lawyers Ed. 2005) ("[A]dministrative agencies can and do make pronouncements of future applicability when deciding an adjudicatory matter, in the same manner as a court may announce what the common law is in deciding a case."); Alfred Aman & William T. Mayton, Administrative Law § 9.4 (West 1993); K.C. Davis, Administrative Law & Government at 283 (2d ed. 1975).

[17] *See also, e.g., Airmark Corp. v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985) (vacating agency's orders regarding exemptions from noise regulations because the agency's treatment of different entities was "grossly inconsistent and patently arbitrary"); *Contractors Transp. Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) (vacating agency's decision not to permit conduct it had previously permitted, stating that "[p]atently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary"); *Marco Sales Co. v. FTC*, 453

conclusion that two consent decrees (considered in light of the FTC's five-decade regulatory history) constitute sufficient authorization of the use of descriptors to trigger the statutory exemption of the CFA is consistent with this body of well-established authority.[18]

The cases petitioners cite are not to the contrary. For example, petitioners rely heavily on *Trans Union Corp. v. FTC*, 245 F.3d 809 (D.C. Cir. 2001) (cited in Pet. at 11-12), but that case did not address the extent to which a consent decree can provide authorization to other industry participants. Instead, that case dealt with two arguably

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F.2d 1, 7 (2d Cir. 1971) ("[L]aw does not permit an agency to grant to one person the right to do that which it denies to another similarly situated.") (quoting *Mary Carter Paint Co. v. FTC*, 333 F.3d 654, 660 (5th Cir. 1954) (Brown, J., concurring)); *El Rio Santa Cruz Neighborhood Health Ctr. Inc. v. Dep't of Health & Human Servs.*, 300 F. Supp. 2d 32 (D.D.C. 2005) ("It is axiomatic that an agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.") (internal quotation marks and citation omitted); *United States v. Undetermined Quantities of an Article of Drug Labeled as Exachol*, 716 F. Supp. 787, 794-96 (S.D.N.Y. 1989) (finding that, because the FDA treated one company a certain way in a determining when to take enforcement action, it had to treat defendant the same way).

[18] Petitioners contend erroneously that PM USA conceded in two submissions filed before the FTC that the FTC did not authorize the use of descriptors. The 2002 Petition for Rulemaking (FTC Sept. 18, 2002), MIPM-7543, had nothing to do with the issue in this case, but was filed to request that, given *new* scientific developments, the FTC should develop a *new* regime for the use of descriptors. Notably, PM USA explicitly stated in that petition that the FTC had approved the use of existing descriptors: "[t]he FTC has specifically permitted the use of descriptors such as 'low,' 'lower,' and 'reduced' tar that reflect the [FTC] Method's yield measurements." *Id.* at 4. Similarly, in its 1997 submission, PM USA also acknowledged that the FTC had authorized descriptors, noting that the "established use" for these descriptors is to describe tar and nicotine yields according to the FTC Method and that "changes in the established use of those terms could lead to substantial confusion." MIPM-7336, at 95.

inconsistent FTC orders entered at two different points in time against the same party. The issue before the D.C. Circuit was how to resolve any alleged inconsistency that may have existed. Ultimately, the court determined that no inconsistency existed. *Id.* at 816-17. Here, in contrast to *Trans Union*, there is no dispute that the FTC's actions and its consent decrees point in one direction: that the use of descriptors was permissible so long as they were substantiated by FTC Method results.

In fact, *Trans Union* supports the notion that consent decrees provide informal authorization of the actions of similarly situated non-parties. The *Trans Union* court acknowledged that the Commission's failure to treat similarly situated parties in the same manner "might suggest that the Commission has acted arbitrarily and capriciously." *Id.* at 816. Thus, *Trans Union* implies -- as other courts have held -- that the FTC must treat all parties in an industry alike so that permitting action by one industry member would constitute permission to other members as well. *See supra* at 18-21.

Similarly, *Beatrice Foods Co. v. FTC*, 540 F.2d 303 (7th Cir. 1976) (cited in Pet. at 12-13), does not conflict with *Price*. There, the defendant claimed that its acquisition was not a violation of the Clayton Act by relying on an earlier consent decree involving another party and the FTC. *Id.* at 312. The Seventh Circuit rejected the argument, noting that there were factual differences between the case before it and the earlier consent decree. *Id.* As petitioners note, the Seventh Circuit also acknowledged that the FTC can subsequently change its mind, and the mere fact that it entered into one consent decree does not mean it is eternally bound to positions taken in that decree. *Id.* But that does not refute the principle that consent decrees can provide authorization to an industry where the FTC has not changed

its mind but instead has been consistent in its views -- as is the case here.

B. No Conflict Exists As To Whether A Consent Decree Can Be Enforced Against A Non-party -- An Irrelevant Issue Here.

Petitioners also claim a "circuit split" as to whether a consent decree can be enforced against a non-party. *See Intergraph Corp. v. Intel Corp.*, 253 F.3d 695 (Fed. Cir. 2001) (cited in Pet. at 13); *Sakon v. Pepsico, Inc.*, 553 So. 2d 163 (Fla. 1989) (cited in Pet. at 14); *Whitinsville Plaza, Inc. v. Kotseas*, 390 N.E.2d 243 (Mass. 1979) (cited in Pet. at 14). But there is no such split. Each decision that petitioners cite agreed with the self-evident proposition that an agency cannot impose liability and grant relief against one party based solely on the violation of a consent decree with someone else.[19] The Illinois Supreme Court did not hold otherwise. On the contrary, it expressly *agreed* that "a consent order may be enforced only against the party who agreed to the terms of the order." Pet. App. 67a. No conflict is created by the court's conclusion that, even if a consent decree is not binding on non-parties, it can still provide the kind of implicit, informal authorization sufficient to trigger the CFA's statutory exemption as a matter of state law. *Id.* at 54a-67a.[20]

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[19] *See, e.g., Intergraph*, 253 F.3d at 698 ("a consent order does not establish illegal conduct"); *Sakon*, 553 So. 2d at 166 (refusing to impose liability based on consent decree and noting that "[n]o legal standard of duty is set forth in a consent order"); *Whitinsville Plaza*, 390 N.E.2d at 252 (refusing to find a "per se violation of any Federal law" based on consent decrees).

[20] Petitioners' reliance upon 15 U.S.C. § 45(m)(1)(B) (cited in Pet. at 15-16) fails for the same reason. In the amendments to that section, Congress simply codified the common sense principle that the FTC could not obtain civil penalties based on the fact that a defendant had violated a consent

C. No Conflict Exists With The Prior Holdings Of This Court.

Petitioners also rely on *United States v. Armour & Co.*, 402 U.S. 673 (1971) (cited in Pet. at 17-18), in asserting that the decision below conflicts with this Court's precedent. But, again, there is no conflict. In *Armour*, the issue was whether the terms of an antitrust consent decree prohibited a signatory to the decree from engaging in a proposed business acquisition. *Id.* at 673-75. The Court found that the terms of the consent decree did not prohibit the acquisition. *Id.* at 677-78. The case turned on the interpretation of the substantive terms of the consent decree, not who was authorized to act under it. *Armour* simply does not address the issue for which petitioner cites it -- whether a consent decree with an industry participant can implicitly authorize conduct for others in the same industry.

Petitioners' reliance upon *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961) (cited in Pet. at 16), is also misplaced and provides no basis for a claim of conflict. There, the Court merely noted that the remedies that the FTC had provided for in previous consent decrees were not binding on the Court in determining what relief was appropriate for a violation of the Clayton Act. *Id.* at 330 n.12.

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decree to which it was not a party. Instead, the FTC would have to offer independent proof that the conduct was deceptive within the meaning of the FTC Act. *Id.*; *see also* 15 U.S.C. § 45(b). Again, that has no bearing on whether consent decrees can provide direction as to what conduct is authorized. For the same reason, petitioners' argument that consent orders are "not controlling case precedent," Pet. at 18-19 (citation and quotation omitted), is irrelevant and fails.

The Court did not address whether consent decrees can provide informal or implicit authorization by the FTC.[21]

Finally, *Local Number 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (cited in Pet. at 17), held only that a third party cannot preclude other parties from entering into a consent decree. *Id.* at 529. Although petitioners rely upon the *Local Number 93* Court's statement that "a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree," *id.* at 529, they fail to explain how a consent decree "authorizing" conduct by a non-party imposes any such obligation. *See also supra* at 23 (distinguishing cases cited by petitioners on the basis that a party cannot base liability on the violation of a consent decree with someone else).

In short, none of this Court's cases cited by petitioners creates any conflict, let alone provides a basis for granting review in a case that was decided on entirely state law grounds.

D. Petitioners Have Waived Any Argument That The CFA's Exemption Implicates Federal Law

Finally, petitioners have waived the argument that is the basis of their Petition -- *i.e.*, that federal law governs the significance of the FTC's consent decrees even under the CFA's exemption. In opposing summary judgment in the trial

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[21] Moreover, petitioners' argument that "judicial consent decrees are creatures of contract" is unavailing. *See* Pet. at 16-17. For example, in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), the Court discussed the nature of consent decrees generally as they relate to the relationship between parties to the consent decree. *Id.* at 86-87 (discussing consent decrees as "entered into by parties" after reaching "[an] agreement"). The Court did not discuss how a consent decree affects non-parties.

court, in their proposed findings of fact and conclusions of law, and on appeal in the Illinois Supreme Court, petitioners never argued that whether the consent decrees constitute "specific authorization" is an issue that should be decided as a matter of federal law. Indeed, petitioners below did not cite any of the federal authorities upon which they rely in their Petition when they argued that the CFA exemption did not apply. Instead, petitioners relied on Illinois state-law authorities.[22] This is yet another reason to deny review. *See, e.g., Bath Iron Works Corp.*, 506 U.S. at 162 n.12 (finding that issues not raised below were waived); *Auer*, 519 U.S. at 464 (declining to consider argument "inadequately preserved in the prior proceedings"). Indeed, this Court has dismissed a writ of *certiorari* as improvidently granted where "central issues on which resolution of the question presented may well turn cannot be reached or resolved" because they were not raised below. *EEOC v. Fed'l Labor Relations Auth.*, 476 U.S. 19, 24 (1986).[23]

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[22] *See* Appellees' Br. at 66, *Price v. Philip Morris Inc.*, No. 96326 (Ill. July 12, 2004) (citing *Lanier v. Assocs. Fin., Inc.*, 114 Ill. 2d 1 (1986); *Jackson v. South Holland Dodge, Inc.*, 197 Ill. 2d 39, 51-52 (2001); *Jenkins v. Mercantile Mortgage Co.*, 231 F. Supp. 2d 737 (N.D. Ill. 2002)); C17123, C17248 (citing *Aurora Firefighter's Credit Union v. Harvey*, 516 N.E.2d 1028, 1036 (Ill. App. Ct. 1987)).

[23] The first time that petitioners argued that the issue is governed by federal law was on rehearing -- *after* the Illinois Supreme Court had already held that the CFA's exemption applied. *See* Plaintiffs-Appellees' Pet. for Rehearing at 1-2 (arguing that the Illinois Supreme Court "misapplied *federal law* regarding the scope of FTC consent orders") (emphasis added). It is axiomatic that arguments cannot be raised for the first time on rehearing. *See, e.g., Miller v. Police Board, City of Chicago*, 349 N.E.2d 544, 552 (Ill. App. Ct. 1976); *In re Club Assocs.*, 956 F.2d 1065, 1070 (11th Cir. 1992); *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1482 (Fed. Cir. 1998).

CONCLUSION

There is no jurisdiction here. The Illinois Supreme Court was clear that it was interpreting the CFA's exemption for "specifically authorized" conduct "entirely on the basis of state law." That was within the court's authority; the Illinois legislature and Illinois courts are free to interpret that state-law provision in whatever manner they wish, without regard to federal law. The Court should deny the Petition for Writ of *Certiorari*.

Respectfully submitted,

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October 13, 2006

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Supreme Court, U.S.
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No. 06-465

IN THE
Supreme Court of the United States

SHARON PRICE AND MICHAEL FRUTH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS INCORPORATED, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR RESPONDENT LAW SCHOOLS IN SUPPORT OF PETITIONERS

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October 23, 2006

PARTIES TO THE PROCEEDINGS

Petitioners omitted from the caption of their petition the following law schools that, by order dated September 1, 2004 (*see* App., *infra*), were granted leave by the Illinois Supreme Court to file a brief as appellees in the proceedings below and therefore are respondents in this Court:

Washington University (St. Louis) School of Law
St. Louis University School of Law
University of Illinois College of Law
Southern Illinois University School of Law
Northern Illinois University College of Law
Northwestern University School of Law
University of Chicago Law School
The John Marshall School of Law
Chicago-Kent College of Law (I.I.T.)
DePaul University College of Law
Loyola University Chicago School of Law

INTRODUCTION

Respondent-Law Schools ("Law Schools") were added as co-appellees before the Illinois Supreme Court with the Petitioners in this proceeding because the Law Schools, depending upon the outcome of that appeal, could have received proceeds from the unclaimed compensatory award. *See* Pet. App. 2a. The proceeds referred to by the Illinois court stem from that part of the trial court's judgment of March 21, 2003, which held:

> 7. That in the event there should remain unclaimed funds in the compensatory award rendered herein; then, under the Doctrine of Cy Pres, all said unclaimed funds, when so finally determined by this Court, hereby, are ordered then to be distributed to the following institutions through the Illinois Bar Foundation. Whereupon, the Illinois Bar Foundation is, hereby, appointed to receive, account, protect and so distribute said funds. The distribution of these funds is ordered as follows:
>
> (1) Three percent (3%) to each of the following Law Schools for enhancing studies concerned with the protection of the consumer and with other socio-economic areas of law. Said funds may also be used for providing financial assistance to needy law students. (The total of this award is thirty-three percent (33)):
>
> Washington University (St. Louis) School of Law
>
> St. Louis University School of Law
>
> University of Illinois College of Law
>
> Southern Illinois University School of Law
>
> Northern Illinois University College of Law
>
> Northwestern University School of Law
>
> University of Chicago Law School
>
> John Marshall School of Law
>
> Chicago-Kent College of Law (I.I.T.)

DePaul University College of Law

Loyola University Chicago School of Law

Id. at 214a-215a.

The Law Schools filed a brief in the Illinois Supreme Court addressing the issue of the doctrine of cy pres and why its application was appropriate in this consumer class action. The issue of the application of the doctrine of cy pres was not addressed by the Illinois high court in light of its reversal of the compensatory award.

Although the issue addressed by the Law Schools in the Illinois court is not at issue before this Court, the question presented to this Court is important to the Law Schools because law schools have in the past and may in the future be beneficiaries of cy pres awards in judgments rendered under the Illinois Consumer Fraud and Deceptive Business Practices Act and the Illinois Uniform Deceptive Trade Practices Act, the statutes at issue in this appeal. The Law Schools are concerned that, if state courts too narrowly restrict the application of those acts, the prospect of future such awards will be more remote. The question presented to this Court is an important one, therefore, not only for the consumer class in this action, but for the many worthwhile beneficiaries of consumer class awards that are working with the courts and the legislative bodies in furthering the goals set forth in this important legislation.

THE QUESTION PRESENTED TO THIS COURT IS AN IMPORTANT ONE FOR THIS COURT TO CONSIDER BECAUSE IT MAY IMPACT ADVERSELY THE EFFORTS OF THE STATES AND THE ORGANIZATIONS THAT WORK WITH THEM IN COMBATING CONSUMER FRAUD

The legislative intent in creating consumer fraud acts was to address the societal harm that attends fraud. Consumer class actions have played a critical role in furthering the purposes of these consumer acts. Cy pres distributions arising from these consumer actions in turn have

provided a valuable tool in achieving public policy objectives, which include enforcement, deterrence and disgorgement goals. Cy pres recipients have endeavored to deter fraud and thereby protect consumers in Illinois.

There is no question that law schools and other educational institutions through cy pres awards have engaged in education and training to minimize the likelihood of future fraud in Illinois. The court's decision below threatens to undo that benefit in two ways. First, the decision may well circumscribe operation of the consumer fraud statutes in general, which have contributed to the welfare of consumers in Illinois in many ways. Second, by curtailing operation of the statutes, the decision minimizes further cy pres opportunities that can be utilized to build the foundation for effective outreach efforts to combat fraud in Illinois.

Accordingly, for the reasons stated, this Court should grant the petition for certiorari.

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October 23, 2006

APPENDIX

[Seal Omitted]

SUPREME COURT OF ILLINOIS

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September 1, 2004

Mr. J. Timothy Eaton
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In re: Sharon A. Price et al., etc., appellees, v. Philip Morris, Incorporated, appellant. No. 96236

Today the following order was entered in the captioned case:

Motion by Washington University (St. Louis), School of Law, St. Louis University School of Law, University of Illinois College of Law, Southern Illinois University School of Law, Northern Illinois University College of Law, Northwestern University School of Law, University of Chicago Law School, The John Marshall School of Law, Chicago-Kent College of Law (I.I.T.), DePaul University College of Law and Loyola University Chicago School of Law for leave to join as additional appellees and file a brief instanter. Motion allowed.

Order entered by Justice Rarick.

Very truly yours,
/s/ JULEANN HORNYAK
Clerk of the Supreme Court

cc: All Counsel of Record

(4)

Supreme Court, U.S.
FILED
OCT 25 2006
OFFICE OF THE CLERK

No. 06-465

IN THE
Supreme Court of the United States

SHARON PRICE AND MICHAEL FRUTH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS INCORPORATED, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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October 25, 2006

AMENDED LIST OF PARTIES TO THE PROCEEDINGS

Petitioners inadvertently omitted from the caption of their petition the following law schools that, by order dated September 1, 2004, were granted leave by the Illinois Supreme Court to file a brief as appellees in the proceedings below and therefore are respondents in this Court:

Washington University (St. Louis) School of Law
St. Louis University School of Law
University of Illinois College of Law
Southern Illinois University School of Law
Northern Illinois University College of Law
Northwestern University School of Law
University of Chicago Law School
The John Marshall School of Law
Chicago-Kent College of Law (I.I.T.)
DePaul University College of Law
Loyola University Chicago School of Law

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STATUTES

Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*:

15 U.S.C. § 45(m)(1)(B) 7

Philip Morris does not deny that the question presented here — whether, as a matter of federal law, a negotiated Federal Trade Commission ("FTC") consent order immunizes non-parties from liability under otherwise applicable state law for conduct similar to that addressed in the consent order — is both important and recurring. Nor does Philip Morris seriously defend the Illinois Supreme Court's erroneous view of the legal effect of such consent orders. Instead, it offers meritless jurisdictional objections and mischaracterizes the cases underlying the deep conflict on the legal effect of FTC consent orders. This Court should grant review to resolve the existing split among the state courts and federal courts of appeals and to ensure that FTC consent orders are not given unintended effect in a manner that damages the FTC's enforcement objectives.

I. PHILIP MORRIS'S PROCEDURAL OBJECTIONS HAVE NO MERIT

A. This Court Has Jurisdiction To Review The Federal-Law Issue Presented By The Petition

Although the ultimate issue before the Illinois Supreme Court was whether Philip Morris was liable under state law for its fraudulent conduct, the court recognized that, because of a statutory exemption for conduct authorized by a federal regulatory body, it could resolve that issue only by first deciding a "dispositive" (Pet. App. 64a) threshold issue of federal law — whether two FTC consent orders were "an implicit authorization for other industry members to conduct themselves in the same manner." *Id.* at 70a. As the Illinois court put it, "the real issue is whether the FTC has specifically authorized [Philip Morris] and other cigarette manufacturers to use [light descriptors] on their packaging and in their advertising." *Id.* at 56a. This Court settled long ago that, when resolution of a state-law issue depends on a determination of federal law, this Court has jurisdiction to review the federal-law question. *See Standard Oil*, 316 U.S. at 483-85.

Philip Morris maintains that the Illinois court did not decide an issue of federal law and that, "no matter how this Court interprets federal law, the Illinois Supreme Court's decision would remain the same." Opp. 14. But, in numerous passages, the Illinois Supreme Court was emphatically clear that, to decide whether Philip Morris could invoke the state statutory safe-harbor exemption, the court had to analyze and construe the legal effect of FTC consent orders on non-parties. *See* Pet. 29-30.[1]

That question — the legal effect of FTC consent orders on non-parties — is a "relationship which is controlled by federal law." *Standard Oil*, 316 U.S. at 483. And the Illinois court's analysis assumed as much. The court based its holding on "authorization" directly on what it perceived as an FTC judgment not to take enforcement action against Philip Morris's frauds: "Because [Philip Morris] was specifically authorized to use [light descriptors] *without fear of the FTC challenging them as deceptive or unfair*, it is exempt from civil liability" under state law. Pet. App. 86a (emphasis added). But Illinois law cannot create such a safe harbor from *federal* enforcement efforts; only federal law can do so. Thus, the court necessarily con-

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[1] *See* Pet. App. 67a (court must "delve deeply into the functions and actions of a federal agency"); *id.* at 70a (reading FTC statements as "suggest[ing] that a consent order may serve as authorization for non-parties to the order to follow its directives"); *id.* at 77a (construing federal authority to mean that "consent orders obtained by the FTC with respect to one industry member" authorize "other industry members to act in conformity with those orders"); *id.* at 79a (the FTC "could, and did, specifically authorize all United States tobacco companies" to use light descriptors); *id.* at 86a ("[A] consent order entered into by the FTC with one member of a regulated industry . . . provides implied authority for other members of the regulated industry to engage in the same conduct."); *see also id.* at 161a ("Illinois courts necessarily have become embroiled in the technical aspects of FTC voluntary consent orders") (Freeman, J., dissenting upon denial of rehearing); *id.* at 166a (FTC consent orders were "at the heart of [the court's] analysis").

strued *federal* law in deciding that Philip Morris was exempt from liability under the state safe harbor provision.[2]

Philip Morris relies heavily (Opp. 13-14) on the Illinois court's statement that it "resolved the . . . case entirely on the basis of state law by construing and applying an exemption clause in a state statute." Pet. App. 87a. Certainly the court had to decide whether the state statutory exemption immunized Philip Morris from all liability for its many fraudulent actions. *See* Pet. 29-30. But, in resolving that question, the court had to determine the legal effect of the FTC's actions — quintessentially a matter of federal law. In our federal system, a state court cannot flout this Court's precedents and a federal agency's own interpretations of its acts to decide that a federal agency has "authorized" certain conduct. Particularly given the Illinois court's apparent effort to ascertain how the FTC treats its own consent orders and the legal effect those orders are given under federal judicial decisions, the court's statements that it was resolving the case based entirely on state law are more plausibly read as simply misunderstanding the interplay between federal and state law when a federal agency's action is given legal effect in a state statute.[3]

Michigan v. Long, 463 U.S. 1032 (1983), does not affect that analysis. The clear-statement rule of *Long* applies when it is unclear whether a state court's judgment rests on a federal-law ground or on an independent and adequate state-law ground. *See id.* at 1040-42. That is not

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[2] Dr. Peterman testified (Opp. 6-7), albeit erroneously, about the significance of FTC consent orders as a matter of *federal* law. That testimony cannot overcome the authority demonstrating that FTC consent orders may not be used to regulate non-parties. *See* Pet. 15-22.

[3] Philip Morris's arguments here confirm the point. It defends the court's decision by arguing that "consent decrees . . . can be used to set policy for industries as a whole — not just the participants involved in the proceeding." Opp. 20. In our federal system, a state court simply has no power to make such a determination. Whether FTC consent orders do have such an industry-wide effect rests on federal law.

the issue here. State law unquestionably provides the basis for Philip Morris's liability and defines the scope of the exceptions to that liability. But the federal-law issue is embedded within the ultimate question of state-law liability. *Long* neither speaks to nor addresses a situation where, as here and in *Standard Oil*, state law *incorporates* an issue of federal law. In those cases, this Court clearly "'retains power to review the decision of a federal issue in a state cause of action.'" *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (per curiam) (quoting *Merrell Dow*, 478 U.S. at 816); *Standard Oil*, 316 U.S. at 483. *See also Grable*, 125 S. Ct. at 2368 (federal jurisdiction where IRS notice was "essential element of [state] claim"). The state court is free to construe broadly the scope of the exceptions; but, in applying those exceptions to a federal agency's actions, the court must correctly construe federal law.[4]

Given the substantial federal interests in a uniform interpretation of the FTC's consent-decree practices and effects, this Court must have jurisdiction to correct erroneous interpretations of FTC actions. *See* Pet. 24-27. To accept Philip Morris's rationalization of the lower court's action would lead to the unacceptable result that the 33 other States with similar safe-harbor provisions (Pet. App. 234a) could adopt idiosyncratic understandings of federal regulatory practice and insulate them from this Court's review. FTC enforcement efforts would be chilled greatly under such a patch-work regime. *See* Pet. 27.

B. The Federal-Law Issue Is Before This Court

Philip Morris's waiver argument (Opp. 25-26) also has no merit. Before the Illinois court, Philip Morris argued that the 1971 and 1995 consent orders regulated non-

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[4] Philip Morris quotes statements that the court intended "'to ascertain and give effect to the intent of the legislature.'" Opp. 13 (quoting Pet. App. 56a-57a). In so stating, the court was construing the *scope* of the exceptions and not the *application* of them to a federal agency's practices. *See, e.g.*, Pet. App. 50a ("Once the statute is properly construed, its terms must be applied to the circumstances of the individual case to determine whether it bars this action.").

parties and that those federal decrees *preempted* state causes of action. *See* Appellant's Opening Br. 53, 58-60 (Ill. filed Dec. 10, 2003). Petitioners answered by arguing, among other things, that those consent orders were entered "against other cigarette companies" and did not authorize "Philip Morris' use" of light descriptors. Appellees' Br. 65 (Ill. filed July 12, 2004). Petitioners cited, for example, the FTC's 1997 notice as proof that the FTC had not authorized, through consent orders or otherwise, the use of light descriptors on an industry-wide basis. *See id.* at 64-65. Only in its reply brief — which petitioners had no opportunity to answer — did Philip Morris cite *federal* authority specific to consent orders, such as *Mandel Brothers*, to support its contention that such orders establish federal "policy" binding on non-parties to the decree. Appellant's Reply Br. 34-35 & n.28 (Ill. filed Oct. 4, 2004).

Given that Philip Morris itself raised the federal issue of the effect to be given the FTC consent orders, there was nothing for petitioners to waive. In any event, the Illinois court properly considered and passed on the issue on which petitioners seek certiorari: "With regard to the 1971 and 1995 consent orders, plaintiffs dispute their relevance to the conduct of any industry actor other than the company that was a party to the enforcement action." Pet. App. 53a. Because the Illinois court "passed upon" that federal issue, it is well settled that this Court "permits review of [the] issue." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal quotation marks and alteration omitted); *see United States v. Williams*, 504 U.S. 36, 40-45 (1992).[5]

II. THIS PETITION RAISES IMPORTANT ISSUES WARRANTING THIS COURT'S REVIEW

Philip Morris has not disputed that the federal-law issues raised by the Illinois court's decision are important

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[5] The additional authorities cited by petitioners on this point are only "new argument[s] to support what has been [a] consistent claim" that the FTC consent orders did not authorize Philip Morris's conduct. *Lebron*, 513 U.S. at 379.

and recurring. *See* Pet. 24-27. In fact, Philip Morris acknowledges (Opp. 17 n.14) that the issues are relevant to important suits pending across the nation in which it is defending against liability with the same arguments erroneously accepted by the court below. Its arguments against this Court's review are unpersuasive.

A. The Court Below Erred In Interpreting The Purpose And Effect Of FTC Consent Orders

Philip Morris's arguments either have been addressed in the petition or are otherwise irrelevant to whether consent orders serve as industry-wide rules.

First, Philip Morris claims that agencies "often set industry-wide policies through administrative adjudications and other informal means . . . including consent decrees." Opp. 18-19. It purports to support that proposition with decisions holding that agencies may set rules through *adjudication*. *See id.* But that distinctive form of agency decision-making says nothing about whether consent orders entered *in lieu of* adjudication may also establish industry-wide rules. They do not. *See* Pet. 23.[6]

Second, Philip Morris's assertion (Opp. 19) that the FTC is "particularly accustomed to setting policy" through consent orders is contradicted by longstanding FTC practice. *See* Pet. 18-20. Neither *Mandel Brothers* nor *Holloway* establishes that consent orders are vehicles for enacting industry-wide rules. *See* Pet. 18 n.9, 23.[7] And *Abrams* concerns only whether a *party* to a consent order may argue that the order preempts inconsistent state-law obligations. *See* 897 F.2d at 36, 39.

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[6] Respondent's other case (Opp. 19), *San Francisco Police Officers' Ass'n v. City & County of San Francisco*, 812 F.2d 1125, 1129 (1987), *withdrawn and superseded*, 869 F.2d 1182 (9th Cir. 1988), holds only that a civil service rule that prevents a city from complying with a consent decree — to which it was a *party* — may be preempted.

[7] *O'Neill Investigations* and *Schubach v. Household Finance Corp.*, 376 N.E.2d 140 (Mass. 1978), which accord with the decision below, misconstrue *Mandel Brothers* and ignore *du Pont*. *See* Pet. 10-11, 18 n.9. They also conflict with the majority rule. *See* Pet. 11-14.

Philip Morris also points out (Opp. 19-20) that the FTC routinely subjects proposed consent orders to notice-and-comment procedures. But it presents no authority that giving affected persons an opportunity to comment on a consent decree transforms that decree into an industry-wide rule. In any event, Philip Morris's suggestion is contradicted by the FTC's longstanding practice and 15 U.S.C. § 45(m)(1)(B), both of which flatly reject Philip Morris's position. *See* Pet. 18-20.[8]

Third, Philip Morris argues (Opp. 20) that, "when an agency permits one member of an industry to engage in certain conduct . . . , the agency cannot prohibit similarly situated competitors from engaging in the same conduct." Notably, nothing in the Illinois court's decision suggests that as a rationale for its holding. And with good reason. That principle conflicts with this Court's decisions, federal courts of appeals' decisions, and the FTC's own exercise of prosecutorial discretion. *See* Pet. 11-14, 16-20; *infra* p. 9. Indeed, if Philip Morris were correct, the cases cited in the petition for the conflict would have come out differently, because they hold that an FTC consent decree does not bind a non-party to the decree. Such a decree therefore cannot *authorize* a non-party's conduct.[9]

Fourth, Philip Morris attempts to reconcile the Illinois court's holding with this Court's decisions. *See* Opp. 24-25. It argues, for example, that *du Pont* did not address whether FTC consent orders provide implied authorization to engage in conduct, but instead merely concluded

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[8] Philip Morris cites (Opp. 20 n.16) a hodgepodge of other authority on consent decrees but makes no effort to differentiate the organic statutes underlying different agencies' practices. As the unrebutted authorities in the petition make clear, *FTC* consent orders do not establish agency policy. *See* Pet. 15-22.

[9] Philip Morris's assertion (Opp. 23 & n.20) that whether an FTC consent order can be enforced against a non-party is irrelevant ignores Congress's amendment to section 45(m)(1)(B), which demonstrates that Congress views FTC consent orders as a unique agency tool that cannot be used to set industry-wide policy. *See* Pet. 15-16.

that "the remedies that the FTC had provided for in previous consent decrees were not binding on the Court in determing what relief was appropriate." Opp. 24. But, by making clear that a non-party has no legal claim to a remedy afforded to other parties in consent orders, *du Pont* establishes that consent orders have no effect outside of the proceedings in which they are entered. *Du Pont*'s holding thus demonstrates the fundamental error of the Illinois court's judgment. *See* 366 U.S. at 330 n.12. That erroneous view of FTC consent decrees will disrupt the settled practices of the FTC, which will now have to gauge the effect on state law enforcement efforts as to non-parties every time it enters into a consent decree.[10]

B. The Divide Over The Legal Effect Of FTC Consent Orders Is Significant

Philip Morris agrees that the Eighth Circuit and the Alaska Supreme Court have sided with the Illinois court's view that FTC consent orders immunize non-parties from liability for similar conduct. Philip Morris wrongly disputes that the D.C., Seventh, and Federal Circuits, and the supreme courts of Florida and Massachusetts, conflict with those judgments.

Philip Morris argues (Opp. 21-22) that *Trans Union* is distinguishable because no third party there sought to claim a benefit from the FTC decree. But that case clearly holds that FTC orders neither bind nor authorize third-party conduct. The FTC denied to a regulated party the right to engage in certain conduct in which a prior consent order had allowed *another party* to engage. *See In re Trans Union Corp.*, 2000 FTC LEXIS 23, at *38 n.22. The FTC reasoned that the prior order had no "preceden-

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[10] Philip Morris devotes pages to a recitation of its various lower court arguments and evidentiary positions that were either rejected or avoided below. Issues of class certification and damages have no bearing on the propriety of this Court's review: the majority "decline[d] to address" the certification issues, Pet. App. 85a, and, whatever the appropriate measure of damages, the court's error of federal law has prevented Illinois consumers from recovering *any* damages.

tial effect to [its] opinion." *Id.* Although the D.C. Circuit kept open the possibility that the FTC's action might be subject to an arbitrary-and-capricious challenge, it affirmed the FTC and adopted the FTC's reasoning that the consent order "[was] not before [the FTC] in this matter and it [was] without precedential effect on this opinion." 245 F.3d at 816-17 (internal quotation marks omitted).

Philip Morris's attempt (Opp. 22-23) to distinguish *Beatrice Foods* is nonsensical. It reads the decision to imply that a non-party to the decree can rely on it when the FTC "has not changed its . . . views." *Id.* But the Seventh Circuit's holding — that an industry participant could not rely on a prior consent decree entered against a different entity because it was not "controlling precedent" — cannot be reconciled with the decision below regardless of any change in the agency's views. *See* 540 F.2d at 312. In any event, the FTC disputes Philip Morris's use of "light" descriptors, both in a 1997 notice and in the United States' landmark RICO suit. *See* Pet. 21-22 & n.11. The conflict between the Seventh Circuit and the Illinois Supreme Court should be resolved to avoid disparate results between state and federal courts on the same principle of law.

Intergraph Corp., *Sakon*, and *Whitinsville Plaza* also conflict with the decision below for similar reasons. Those cases concerned not simply the enforcement of specific terms of a consent order against a non-party, but rather whether an FTC consent order establishes policy that can affect the rights, duties, or responsibilities of non-parties to the proceeding. *See* Pet. 11-14. In each case, the answer was "no" — an outcome in conflict with the Illinois court's holding that FTC consent orders "authorize" a non-party's conduct.[11]

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[11] There is no merit to Philip Morris's suggestion (Opp. 23) that this Court must consider a conflict only as to the application of an FTC consent decree under other States' unfair practices statutes. Had the court below applied the majority rule and the FTC's own interpretation

III. THE COURT SHOULD ALSO CONSIDER HOLDING THIS CASE FOR *WATSON* OR CALLING FOR THE GOVERNMENT'S VIEWS

This Court has called for the Solicitor General's views in *Watson v. Philip Morris Cos.*, No. 05-1284 (filed Apr. 7, 2006). In offering the government's position on whether the FTC so heavily regulates Philip Morris that the company may invoke the federal officer removal provision, the Solicitor General will likely address the legal effect to be given the 1971 and 1995 FTC consent decrees, because the Eighth Circuit in *Watson* relied on those decrees to support its erroneous holding that they authorize or control Philip Morris's conduct. The Solicitor General's views could inform the Court in considering the issue raised here, which would counsel in favor of holding this petition for disposition of *Watson*. Alternatively, given the substantial federal interests implicated by the lower court's erroneous understanding of FTC consent decrees, *see* Pet. 24-27, if it does not grant certiorari outright in this case, the Court may wish to request the views of the United States in this case as well, so that the Solicitor General may take into account the consequences to the FTC of the Illinois Supreme Court's ruling below in formulating a position that would inform the proper disposition of both this case and *Watson*.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. Alternatively, the case should be held pending the disposition of *Watson v. Philip Morris*, No. 05-1284, or the views of the United States should be requested.

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of the legal effect of the FTC consent decrees, the outcome below would have been different. That is sufficient to show a conflict.

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IN THE

Supreme Court of the United States

SHARON A. PRICE, *et al.*,

Petitioners,

v.

PHILIP MORRIS INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE AMERICAN LEGACY FOUNDATION, ACTION ON SMOKING AND HEALTH, CAMPAIGN FOR TOBACCO-FREE KIDS, CITIZENS' COMMISSION TO PROTECT THE TRUTH, CONSUMER FEDERATION OF AMERICAN, LUNG CANCER ALLIANCE, NATIONAL AFRICAN AMERICAN TOBACCO PREVENTION NETWORK, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, PUBLIC CITIZEN, TOBACCO CONTROL LEGAL CONSORTIUM, TOBACCO CONTROL RESOURCE CENTER, AND U.S. PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

As organizations dedicated to reducing the toll of death and disease associated with tobacco use and to protecting the public against deceptive trade practices, *amici curiae* have a substantial interest in the proper construction of the legal effect of federal agency consent orders on the scope and reach of state consumer protection laws. These state laws serve as critical safeguards against deceptive practices, including those that encourage young people to start smoking and discourage smokers of all ages from quitting. If, as the Illinois Supreme Court held below, a federal agency's decision not to prohibit certain practices in a negotiated consent order can broadly immunize those practices from state regulation, the missions of *amici* will be rendered far more difficult.[1]

The American Legacy Foundation was established in March 1999 as a result of the Master Settlement Agreement between the attorneys general of 46 states and 5 U.S. territories and the tobacco industry. It is dedicated to building a world where young people reject tobacco and anyone can quit. The Foundation develops national programs that address the health effects of tobacco use through grants, technical assistance, youth activism, strategic partnerships, research, counter-marketing and grassroots marketing campaigns, and outreach to populations disproportionately affected by the toll of tobacco. The Foundation's programs include a major national tobacco youth prevention and education effort known as the truth® campaign. Research published in the March issue of the American Journal of Public

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[1] Petitioners have filed with the Court a letter consenting to the filing of all *amicus* briefs, and respondent has consented to the filing of this brief in a letter filed concurrently herewith. No counsel for any party had any role in authoring this brief. Counsel for *amici curiae* previously advised petitioners in connection with an earlier stage of this case, but have not represented petitioners in connection with the preparation or filing of their petition for a writ of certiorari. No one other than *amici curiae* provided any monetary contribution to the preparation or submission of this brief.

Health shows that in 2002, there were 300,000 fewer youth smokers because of truth®. The American Legacy Foundation also promotes a range of programs designed to help adults quit smoking, including quitlines and public awareness and education campaigns.

Action on Smoking and Health (ASH) is a non-profit tax-exempt legal action antismoking organization based in the United States that has been solely devoted to the many problems of smoking for over 36 years. Its principal activity is to serve as a legal action arm of the nonsmoking community, bringing or joining in legal actions concerning smoking, and ensuring that the voice of the nonsmoker is heard. It also serves as an advocate of the nonsmokers' rights movement.

The Campaign for Tobacco-Free Kids works to raise awareness that cigarette smoking is a public health hazard by advocating public policies to limit the marketing and sales of tobacco to children and altering the environment in which tobacco use and policy decisions are made. Tobacco-Free Kids has more than 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing children's use of tobacco products.

The Citizens' Commission to Protect the Truth was created in 2002 to end youth smoking by supporting the American Legacy Foundation's life-saving truth® campaign. The members of the Commission include all the living former U.S. Secretaries of Health, Education and Welfare; U.S. Secretaries of Health and Human Services; U.S. Surgeons General; and Directors of the Centers for Disease Control and Prevention, from every Administration, Republican and Democrat, since Lyndon Johnson. These public health officials have united—for the first time in this nation's history—because of their shared belief that keeping our children and teenagers free from tobacco is the single most important way to prevent death and disease in this country.

The Consumer Federation of America (CFA) is a nonprofit association organized in 1967 to advance the interests of consumers through advocacy, research, and education.

CFA's current membership is comprised of 300 national, state and local consumer groups throughout the country. These organizations represent more than 50 million consumers. Among other issues, CFA advocates for the rights of those harmed in the marketplace by fraud, negligence, predation, deception, and other illegal or injurious acts. CFA supports the longstanding federalist approach to enforcement—providing for strong federal consumer protections while preserving the flexibility for individual states to continue to protect their citizens. Consumers are best protected when federal and state protections complement one another to provide the broadest possible safety net for vulnerable consumers.

The Lung Cancer Alliance is the only national organization providing patient support and advocacy exclusively to those living with or at risk for lung cancer. Its mission is to reverse decades of stigma and neglect by empowering stakeholders, elevating awareness and changing public health policy.

The National African American Tobacco Prevention Network is a national non-profit organization dedicated to facilitating the development and implementation of comprehensive and community competent tobacco control programs to benefit communities and people of African descent.

The National Association of Consumer Advocates (NACA) is a non-profit group of attorneys and advocates committed to promoting consumer justice and curbing abusive business practices that bias the marketplace to the detriment of consumers. Its membership is comprised of more than 1,000 law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates across the country. NACA has established itself as one of the most effective advocates for the interests of consumers in this country. Its advocacy takes many forms, including the publication of guidelines for the appropriate use of the class action device in the consumer context.

Public Citizen is a consumer advocacy organization founded in 1971. On behalf of approximately 100,000 mem-

bers nationwide, it appears before Congress, administrative agencies, and the courts on a wide range of issues and works for the enactment and effective enforcement of laws protecting consumers, workers, and the general public. Over the past 35 years, it is has worked to improve public health laws and regulations and to ensure access to the courts for redress of injuries caused by unsafe and defective products, including, in particular, tobacco products.

The Tobacco Control Legal Consortium (TCLC) is a national network of legal centers providing technical assistance to public officials, health professionals and advocates in addressing legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC grew out of collaboration among specialized legal resource centers serving six states, and is supported by national advocacy organizations, voluntary health organizations and others.

The Tobacco Control Resource Center, founded in 1979, is a division of the Public Health Advocacy Institute devoted to supporting and enhancing public health understanding and commitment among law teachers and students, legislators and regulators, the courts, and others who shape public policy through the law.

U.S. Public Interest Research Group (PIRG) serves as the federation of non-profit, non-partisan, state PIRGs, which conduct public interest advocacy projects on behalf of their nearly one million members around the country. The PIRGs have a longstanding interest in both reducing the incidence of tobacco use and in preserving strong state remedies against deceptive consumer practices. They have supported smokefree indoor air laws to reduce exposure to second-hand smoke and tobacco tax increases to reduce the incidence of smoking. They have conducted research into tobacco company marketing to youth, including through movie placements. They have supported efforts to enact and preserve strong state consumer laws and enforcement against fraud and deceptive practices.

INTRODUCTION AND SUMMARY OF ARGUMENT

In reversing the trial court's decision holding Philip Morris accountable for decades of deceptive trade practices, the Illinois Supreme Court relied on an illusory federal "authorization" in the form of two Federal Trade Commission (FTC) consent orders to which Philip Morris was not even a party. These consent orders, entered in 1971 and 1995, settled FTC enforcement proceedings brought against certain other tobacco companies for representing that their cigarettes were lower in tar than other brands. Given the narrow focus of these proceedings, these negotiated settlement orders required only that the individual respondents disclose the basis for their representations by revealing their cigarettes' tar and nicotine content. Pet. App. 218a-223a (*In the Matter of American Brands*, FTC Docket No. 8799 (1971)); *id.* at 224a-233a (*In the Matter of the American Tobacco Company*, FTC Docket No. C-3547 (1995)). The Illinois Supreme Court, applying a statutory exemption to consumer fraud liability that exists in similar form in two-thirds of the United States, 815 Ill. Comp. Stat. 505/10b(1),[2] concluded that these two FTC consent orders entered against individual companies had authorized *all* U.S. tobacco companies to use the terms "'low,' 'lower,' 'reduced,' or like qualifying terms, such as 'light,'" provided that they otherwise complied with the FTC consent orders. Pet. App. 79a-80a. This federal "authorization," the court held, broadly immunized such representations from state regulation—no matter how false, how fraudulent, or how damaging to public health. *Id.* at 87a-88a.

The Illinois Supreme Court's decision misconstrued federal law in at least two critical respects. *First*, contrary to the court's holding, FTC consent orders do not *authorize* any person or entity—including the party to the order—to engage in any particular course of conduct as a matter of fed-

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[2] *See* Pet. App. 234a (compiling state statutes with similar exemptions for conduct authorized by regulatory entities).

eral law. The FTC is a law enforcement agency, not a licensing agency; its primary function is to prosecute unfair and deceptive trade practices, not to authorize any particular practice in the first instance. Moreover, even if the FTC's determination that a particular practice is not prohibited by federal law could in fact "authorize" a party to engage in non-prohibited conduct—which it could not—consent orders certainly would not suffice. Consent orders reflect the FTC's determination to prohibit certain conduct, but they do not represent the agency's considered and comprehensive judgment as to what federal consumer protection law does *not* prohibit. As to conduct *not* prohibited, consent orders at most reflect an exercise of the FTC's discretion not to prosecute under the circumstances of the case and in light of constraints on the agency's resources and priorities at the time. *Second*, and in any event, FTC orders neither bind nor authorize non-parties in any respect. The Illinois Supreme Court erred in treating the 1971 and 1995 consent orders as an industry-wide authorization to engage in deceptive marketing practices.

The Illinois Supreme Court's fundamental misunderstanding of federal law will have grave consequences for both state and federal efforts to regulate deceptive and harmful trade practices. If, as the court held, federal agencies can be deemed as a matter of federal law to *authorize* an entire industry to engage in deceptive practices whenever they negotiate consent orders that do not *prohibit* a single company from engaging in those practices, state laws—vital safeguards in the battle against harmful and deceptive trade practices—will be displaced and rendered ineffective. Moreover, federal agencies will no longer be able to rely on consent orders as one of their most important enforcement tools if an order's limited scope can be read to constitute an industry-wide "authorization." And regulated entities—such as tobacco companies—could deliberately game the federal enforcement process in an effort to extract an industry-wide safe harbor for future deceptive practices. Under the regime the Illinois Supreme Court has invented, deceptive and

harmful practices like those at issue here—practices found to have contributed to the deaths of millions of Americans—would simply get a pass.

The Court should grant review.

BACKGROUND

Tobacco use is the leading cause of preventable death and a major cause of disease in the United States.[3] Tobacco is a highly addictive product[4] that harms almost every organ in the body, causing heart attacks, strokes, emphysema, and almost one-third of all cancer deaths.[5] Twelve hundred Americans die every day from smoking.[6] More than 8 million suffer from smoking-related illnesses.[7] Secondhand smoke is also deadly, killing approximately 50,000 Americans every year.[8] And as tobacco consumers die or quit, tobacco companies have found a steady supply of teenagers to replace them.[9] For all of these reasons, as this Court has observed, "tobacco use, particularly among children and ado-

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[3] U.S Dep't of Health & Human Servs., *The Health Consequences of Smoking: A Report of the Surgeon General* 3 (2004) ("2004 Surgeon General's Report").

[4] *See generally* Michael C. Fiore et al., *Clinical Practice Guideline: Treating Tobacco Use and Dependence* (2000).

[5] 2004 Surgeon General's Report, *supra* n.3, at 25-30; J. Michael McGinnis & William H. Foege, *Actual Causes of Death in the United States*, 270 J. Am. Med. Ass'n 2207-2212 (1993).

[6] 2004 Surgeon General's Report, *supra* n.3, at 9; *Annual Smoking-Attributable Mortality, Years of Potential Life Lost and Economic Costs—United States, 1997-2001*, 54 Morbidity & Mortality Weekly Report 625-628 (2005).

[7] *Cigarette Smoking Attributable Morbidity—United States*, 52 Morbidity & Mortality Weekly Report 842-844 (2000).

[8] Stanton A. Glantz & William W. Parmley, *Passive Smoking and Heart Disease*, 273 J. Am. Med. Ass'n 1047-1053 (1995).

[9] Eighty percent of all smokers start before the age of 18 and 90% before the age of 20. Paul W. Mowery et al., *Legacy First Look Report: Pathways to Established Smoking: Results from the 1999 National Youth Tobacco Survey* 7 (2000).

lescents, poses perhaps the single most significant threat to public health in the United States." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

Advertising and marketing—and in particular, *deceptive* advertising and marketing—have long been the linchpin of tobacco manufacturers' commercial success. Tobacco companies' new customers are, as the companies are well aware, overwhelmingly young people under the age of 20.[10] Advertising has been the key to the companies' strategy for targeting this strategically important market. Tobacco companies spend more than $15 billion per year on marketing their products to this and other key target audiences.[11] This onslaught of commercial advertising and promotional activities reflects tobacco companies' understanding that cigarette advertising is among the most important factors that influence young people to begin smoking, and thereby increase the companies' profits.[12]

As this case demonstrates, the tobacco companies' deceptive marketing has also played a crucial role in deterring smokers of all ages from ceasing use of a product that, when used as directed, kills one out of two of its long-term consumers.[13] The trial court found that Philip Morris responded to growing concerns regarding the health effects of smoking by waging a decades-long "disinformation campaign" in which it "knowingly and falsely disputed scientific conclusions that established a connection between smoking and diseases" in an attempt to "create doubt about the negative health implications of smoking without actually denying these allegations." Pet. App. 174a.

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[10] *See* Mowery et al., *supra* n.9, at 7.

[11] Federal Trade Commission Cigarette Report for 2003, at 1 (2005), *available at* http://www.ftc.gov/reports/cigarette05/050809cigrpt.pdf.

[12] U.S. Dep't of Health & Human Servs., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994), *available at* http://www.cdc.gov/tobacco/sgr/sgr_1994/index.htm.

[13] 2004 Surgeon General's Report, *supra* n.3, at 873.

Cigarettes marketed as "lights" or "low tar" were—and continue to be—a significant and pernicious part of Philip Morris' deceptive marketing program. "Light" and "low tar" cigarettes were designed and promoted to appeal to smokers worried about their health, *see* Pet. App. 174a,[14] yet Philip Morris has long known that there is no scientific support for the proposition that these cigarettes offer any health benefits as compared to so-called full-flavor cigarettes, *see id.* at 182a.[15] Philip Morris and others nevertheless expended considerable resources advertising and promoting these products, directing their marketing efforts toward "health conscious consumer[s]" who would "rely upon the implicit representation of safety." *Id.* at 178a.[16] This strategy was effective: By the mid-1990s, light and low tar cigarettes amounted to about 70% of cigarette sales. *United States* v. *Philip Morris USA Inc.*, No. 99-2496, 2006 WL 2381449, at *31 (D.D.C. Aug. 17, 2006). Approximately 50% of all smokers of "lower tar" cigarettes chose them because they perceived them "to be a 'healthier' cigarette and a potential step toward quitting." *United States* v. *Philip Morris*, 2006 WL 2380650, at *148 (citations omitted). But these smokers were deceived on both counts. "Light" or "low tar"

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[14] National Cancer Inst., U.S. Dep't of Health & Human Servs., Smoking & Tobacco Control Monograph No. 13, *Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* 233 (2001) ("NCI Monograph No. 13"); *see also United States v. Philip Morris USA Inc.*, No. 99-2496, 2006 WL 2380650, at *148-*150 (D.D.C. Aug. 17, 2006).

[15] *See also* NCI Monograph No. 13, *supra* n.14, at 9, 10; *United States* v. *Philip Morris*, 2006 WL 2381449, at *84 ("It is clear, based on their internal research documents, reports, memoranda, and letters, that Defendants have known for decades that there is no clear health benefit from smoking low tar/low nicotine cigarettes as opposed to conventional full-flavor cigarettes.").

[16] *United States* v. *Philip Morris*, 2006 WL 2381449, at *30 ("The FTC's report [on marketing expenditures by the tobacco companies] for 1997 revealed that for every single year from 1967 to 1992, [the tobacco companies'] advertising and promotional spending for low tar cigarettes exceeded their domestic market share.").

cigarettes offer no health benefits as compared to regular cigarettes, and research shows that they may inhibit smokers from quitting and encourage non-smokers to begin.[17]

Far from remaining on the sidelines, the federal government has taken an active role in addressing these fraudulent and deceptive practices. In 1999, the U.S. Department of Justice filed suit against Philip Morris and other major tobacco companies under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. The United States contended, among other things, that the companies' representations regarding "light" and "low tar" cigarettes were false and misleading. After a lengthy trial, the U.S. District Court for the District of Columbia agreed. It concluded that, "over the course of more than 50 years, [the major tobacco companies] lied, misrepresented, and deceived the American public . . . about the devastating health effects of smoking and environmental tobacco smoke." *United States* v. *Philip Morris*, 2006 WL 2380650, at *140. In particular, and much like the Illinois trial court in this case, the D.C. district court found that the companies "distorted the truth about low tar and light cigarettes so as to discourage smokers from quitting." *Id.*

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[17] NCI Monograph No. 13, *supra* n.14, at 10; *see also United States* v. *Philip Morris*, 2006 WL 2381449, at *84 ("Defendants also knew that many smokers were concerned and anxious about the health effects of smoking, that a significant percentage of those smokers were willing to trade flavor for reassurance that their brands carried lower health risks, and that many smokers who were concerned and anxious about the health risks from smoking would rely on the health claims made for low tar cigarettes as a reason, or excuse, for not quitting smoking.").

ARGUMENT

I. THE ILLINOIS SUPREME COURT ERRED IN CONCLUDING THAT FTC CONSENT ORDERS CONSTITUTE FEDERAL AUTHORIZATION TO ENGAGE IN DECEPTIVE ADVERTISING

The Illinois Supreme Court's decision rested on its conclusion that two FTC consent orders "provide[] express authority for the party that was the target of the enforcement action to engage in the conduct described in the consent order," and "implied authority for other members of the [same] regulated industry to engage in the same conduct." Pet. App. 86a. Both assertions are wrong: FTC consent orders provide no authority, express or implied, to engage in any particular course of conduct as a matter of federal law.

A. The FTC's Decision Not To Forbid Certain Conduct In A Consent Order Does Not Constitute Authorization To Engage In That Conduct

Under its organic statute, the FTC has the power to regulate matters relating to consumer protection in two ways: by issuing prophylactic rules and general statements of policy, and by prosecuting offenses. 15 U.S.C. §§ 45, 57a. The FTC consent orders at issue represent an exercise of the latter type of regulatory power.

The FTC's prosecutorial authority, like prosecutorial authority generally, is broadly discretionary. *See Moog Indus., Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); *accord Pendleton* v. *Trans Union Sys. Corp.*, 430 F. Supp. 95, 97-98 (E.D. Pa. 1977). The FTC has the discretionary authority to decide whether it will investigate particular alleged violations and whether it will institute proceedings against alleged violators. *See Pendleton*, 430 F. Supp. at 97-98. It has the discretionary authority to decide whether to proceed against a single firm in the industry or to proceed against all firms at once. *See Moog*, 355 U.S. at 413. And it has the discretionary authority to terminate enforcement proceedings by entering into consent orders "after careful negotiation has produced agreement on [the parties'] precise terms," and thus

save itself "the time, expense, and inevitable risk of litigation." *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971).

Much like plea agreements in criminal prosecutions, these negotiated settlements do not embody the FTC's considered judgment as to what the law requires—or, crucially, as to what the law authorizes. To begin with, consent orders generally address the specific conduct at issue in the enforcement proceedings, not any possible abuse the respondent may previously have committed or may subsequently commit. Although the FTC is certainly entitled to fashion relief that goes beyond merely "prohibiting the illegal practice in the precise form existing in the past," *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959) (internal quotation marks and citation omitted), as a practical matter, consent orders do not often address other conduct of which the agency was aware, and certainly do not address facts or circumstances unknown to the agency at the time. In both the 1971 and the 1995 consent orders, for example, the FTC focused specifically on misrepresentations concerning the relative tar levels in specific brands of cigarettes, and accordingly crafted a settlement agreement that required the respondents in those proceedings to disclose the data relating to their claims. As Justice Freeman noted in dissent below, in neither proceeding did the FTC address the use of the term "lights" to describe cigarettes known by the companies to be just as unhealthy as regular cigarettes. Pet. App. 116a-117a. The 1971 and 1995 consent orders did not—and indeed, did not purport to—set forth comprehensive guidance concerning the boundaries of permissible cigarette marketing, nor did they pass on the lawfulness of false and misleading representations that "light" cigarettes are safer than any other cigarettes—one of the primary issues in this case.

Moreover, like any prosecutorial agency, the FTC need not, and often lacks the resources to, enforce federal law to its limits whenever it enters into a settlement order. As this Court has recognized, even as to those claims that it does

address, an FTC consent order "normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *Armour*, 402 U.S. at 681. The FTC, in particular, chooses not to pursue some violations of law in order to secure more limited remedies without expenditure of further resources. A consent order thus cannot be said to embody the FTC's policy "purposes"; rather, it "embodies as much of [the parties'] opposing purposes as the respective parties have the bargaining power and skill to achieve." *Id.* at 681-682.

For these reasons, an FTC consent order does not authorize—expressly or impliedly—any specific course of conduct as a matter of federal law, by any party. At most, such an order expresses the FTC's determination that certain conduct does not warrant prosecution under the circumstances of the proceeding and in the light of the agency's resources and priorities at that time. The Illinois Supreme Court misapplied federal law in concluding otherwise.

B. An FTC Consent Order Neither Binds Nor Immunizes Non-Parties

The Illinois Supreme Court misconstrued federal law in a second critical respect: Whatever force and effect the 1971 and 1995 consent orders may have with respect to American Brands and American Tobacco, respectively, the orders can have no such effect with respect to Philip Morris. As a matter of federal law, FTC consent orders neither bind nor immunize third parties.

As petitioners have explained, *see* Pet. 15-24, before 1975 the FTC Act permitted the FTC to recover civil penalties only from respondents that violated the terms of cease-and-desist orders issued against them. 1 Stephanie W. Kanwit, *Federal Trade Commission* § 10:7, at 10-32 (1996 & Supp. 2004). In 1975, Congress amended the Act to permit the FTC to bring an action against any party that violated a cease-and-desist order. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No.

93-637, § 205(a), 888 Stat. 2183, 2200-2201 (1975) (codified at 15 U.S.C. § 45(m) (1988)) ("If the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice[.]"). But as a matter of practice, the FTC refrained from bringing § 45(m)(1)(B) enforcement proceedings against nonparties to consent orders, as opposed to fully adjudicated cease-and-desist orders. *See* H.R. Rep. No. 103-138, at 13 (1993). In 1994, Congress codified FTC practice by specifically exempting consent orders from the class of cease-and-desist orders enforceable against nonparties. Pub. L. No. 103-312, § 4 (Sept. 10, 1993) (codified as amended at 15 U.S.C. § 45(m)(1)(B)) ("If the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order, *other than a consent order*, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice[.]") (emphasis added). The House Report explained that, under this amendment, "a case settled by a consent agreement would not qualify as precedent for a section [45(m)(1) (B)] proceeding because the legal and factual issues in question would not have been subject to challenge in an adjudicatory proceeding." H.R. Rep. No. 103-183, at 13-14. Thus, no third party—including Philip Morris—is bound by the restrictions in the consent orders at issue here.

Just as entities cannot be bound by the consent orders to which they were not party, neither can they take shelter in such orders. This Court has itself concluded that a litigant cannot "persuasively cite[]" consent orders to which it is not a party. *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 330 n.12 (1961). The courts of appeals have agreed. For example, in *Trans Union Corp.* v. *FTC*, 245 F.3d 809 (D.C. Cir. 2001), a party under investigation for de-

ceptive trade practices claimed that the FTC impermissibly ordered it to cease activity expressly allowed a competitor under a prior consent order. The D.C. Circuit rejected this claim, agreeing with the FTC that the prior consent order was "'without precedential effect on this opinion.'" *Id.* at 816-817 (D.C. Cir. 2001) (quoting *In re Trans Union Corp.*, No. 0255, slip op. at 16 n.22 (FTC Feb. 10, 2000)). The Seventh Circuit has reached a similar conclusion: "The entering of a consent decree . . . is not a decision on the merits and therefore does not adjudicate the legality of any action by a party thereto. Nor is a consent decree a controlling precedent for later Commission action." *Beatrice Foods Co.* v. *FTC*, 540 F.2d 303, 312 (7th Cir. 1976).

In sum, the FTC consent orders at issue in this case neither expressly nor impliedly authorized Philip Morris—or, for that matter, any other tobacco firm—to engage in deceptive practices. Two consent orders terminating enforcement proceedings involving different parties, at different times, on different factual records, and concerning different aspects of light cigarette marketing practices, do not constitute a federal authorization for Philip Morris' longstanding and tragically successful efforts to deceive the American public.

II. IF LEFT UNCORRECTED, THE ILLINOIS SUPREME COURT'S DECISION WILL DRAMATICALLY HINDER STATE AND FEDERAL EFFORTS TO REGULATE DECEPTIVE TRADE PRACTICES

The Illinois Supreme Court's erroneous determination that federal law authorizes the deceptive advertising at issue is a matter of great importance to efforts to prevent deceptive trade practices nationwide.[18] Because the Illinois

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[18] Given the prevalence of state-law exemptions from consumer-fraud liability for conduct authorized by regulatory agencies, *see supra* n.2 and accompanying text, the potential reach of the decision below is readily apparent. Indeed, the Illinois Supreme Court's reasoning has already been adopted by state courts outside Illinois. *See Aspinall* v. *Philip Morris Cos.*, No. Civ. A. 98-6002, 2006 WL 2971490, at *6 & n.13 (Mass. Super. Ct. Aug. 9, 2006) (noting that, "[d]espite slight differences in the language

Supreme Court's decision turned on a misinterpretation of federal law, this Court can and should review its decision, to prevent the needless erosion of state *and* federal power to protect consumer welfare. *See Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483-485 (1942); *cf. Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2366-2370 (2005).

A. The Illinois Supreme Court's Misreading Of Federal Law Eviscerates Critical State-Law Safeguards Against Deceptive Trade Practices

State consumer protection laws play a vital role in protecting American consumers, and complement the FTC's regulatory efforts in critical respects. Indeed, the FTC strongly supported the passage of such laws; it encouraged the establishment of coordinate consumer protection responsibility at "'the lowest practicable level of government'" to supplement its own enforcement efforts. Sheila B. Scheuerman, *The Consumer Fraud Class Action*, 43 Harv. J. on Legis. 1, 15 (2006) (citation omitted); *see also* William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724, 729-730 & n.14 (1972). Congress, too, has recognized the importance of federal-state cooperation in the field of consumer protection: In 1994, Congress specifically directed the FTC to identify "those areas that might more effectively be enforced at the State or local level," and to report to Congress with recommendations for "achieving

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of the exemption clauses in the Massachusetts and Illinois statutes, the analysis in *Price* is apropos"). Respondent cites *Aspinall* for the proposition that other courts can and do reject the Illinois Supreme Court's interpretation of federal law in this case. *See* Br. in Opp. 17 n.14. Although *Aspinall* parted company with the Illinois Supreme Court with respect to the narrow issue of whether Philip Morris' product packaging complied with the 1971 consent order, it broadly endorsed the Illinois Supreme Court's view that the 1971 and 1995 consent orders authorized Philip Morris' use of "low tar" and similar descriptors under certain circumstances. *See* 2006 WL 2971490, at *8. *Aspinall* thus confirms that the Illinois Supreme Court's decision is of national significance.

greater cooperation between the Commission and the States." Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 13, 108 Stat. 1691, 1696-1697.

State statutes such as Illinois' consumer protection laws are, in some respects, even more powerful tools for consumer protection than their federal counterparts. *See* Lovett, *supra*, at 730. Like similar consumer protection laws in other states, Illinois law provides for both private enforcement and investigation and enforcement by the state attorney general. 815 Ill. Comp. Stat. 505/3, 505/7, 505/10a. These state-law remedies, along with FTC enforcement, "allow for widespread redress of marketplace misconduct and abuse of consumers." National Consumer Law Center, *Unfair and Deceptive Acts and Practices* 1 (6th ed. 2004).

The Illinois Supreme Court's reading of federal law dramatically constrains the states' role in this federal-state partnership. It wrongly denies state attorneys general and private victims the power to halt and remedy deceptive practices, and threatens thereby to eviscerate a crucial set of protections against consumer fraud. And it creates a perverse opportunity for respondents to exploit the FTC consent-order negotiation process to gain immunity for deceptive trade practices of which the FTC simply may not be aware.

The Illinois Supreme Court's misunderstanding of this critical federal-law issue is thus a matter of nationwide significance: for victims of the tobacco companies' deception in Illinois and elsewhere, for state attorneys general seeking to discharge the duties of their office, and for all concerned with the welfare of American consumers.

B. The Decision Impedes Federal Regulatory Efforts

Not only does the Illinois Supreme Court's decision threaten dramatically to hamper state efforts to curb deceptive advertising, but it also threatens substantial interference with the FTC's own regulatory efforts. Like many other federal agencies, the FTC resolves the majority of its enforcement proceedings by entry of consent orders. 1

Kanwit, *supra*, § 12:1, at 12-1. The Illinois Supreme Court's decision affects this work in at least two ways.

First, the FTC entered into many of its existing consent orders on the presumption that these contractual arrangements would bind only the respondent before it, leaving it free to address the conduct of other parties on a case-by-case basis, and in a manner tailored to "the individual circumstances presented." *Weight Watchers* v. *FTC*, No. C93-534R, 1995 WL 548776, at *3 (W.D. Wash. Aug. 16, 1995). The Illinois Supreme Court's decision vitiates that presumption and leaves many existing consent orders open to similar misuses, both by the respondents thereto and by third parties. It thus adds another item to the FTC's regulatory agenda: whether to commence further proceedings with respect to the subjects of past consent orders, lest those orders be treated as authorizing unlawful and deceptive trade practices under state law.

Second, the Illinois Supreme Court's decision will affect the FTC's calculus in future enforcement proceedings. Federal law equips the FTC to choose, as its resources and strategy dictate, whether to address unlawful and deceptive practices through rulemaking, adjudicated orders, or negotiated consent orders. *See supra* I.A. But without the ability to tailor consent orders specifically to the parties involved, *every* consent order negotiation would become more like a rulemaking. This would vastly increase the FTC's workload: Every proceeding would require extensive fact-finding and legal development, and would invite participation by all other members of the same regulated industry. Given the FTC's limited resources, the inevitable result of such a rule would be a decline in the Commission's ability to pursue violators of the consumer protection laws.

Finally, even as to the party before it, the FTC will be disinclined to settle matters short of full achievement of all possible remediation, for fear that an underinclusive compromise will unwittingly immunize the respondent from making restitution to victims under state law. The FTC will have to guard against being manipulated to insulate unlaw-

ful conduct from state liability, a dynamic that could potentially change the basic assumptions of consent-order negotiation.

In the wake of this Court's decision in *Brown & Williamson*, 529 U.S. 120, the FTC has become the primary federal agency with the power to oversee tobacco marketing practices. The Illinois Supreme Court's decision diminishes the FTC's ability to address the kinds of harmful and deceptive marketing practices that have been the long been mainstay of the tobacco industry's success, as well as similar practices in other industries. To tie the FTC's hands in this manner is to blunt one of the principal weapons in the fight against the national tobacco epidemic.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

SHARON PRICE AND MICHAEL FRUTH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS INCORPORATED, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR AMERICAN LUNG ASSOCIATION, AMERICAN LUNG ASSOCIATION OF METROPOLITAN CHICAGO, AMERICAN LUNG ASSOCIATION OF THE UPPER MIDWEST, AMERICAN CANCER SOCIETY, AMERICAN CANCER SOCIETY OF ILLINOIS, AMERICAN ACADEMY OF OTOLARYNGOLOGY – HEAD AND NECK SURGERY, AMERICAN THORACIC SOCIETY, ILLINOIS STATE MEDICAL SOCIETY, ONCOLOGY NURSING SOCIETY, AMERICAN HEART ASSOCIATION, AND AMERICAN PUBLIC HEALTH ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a negotiated Federal Trade Commission consent order operates, as a matter of federal law, as a safe harbor immunizing non-parties to the consent order from liability under otherwise applicable state law for conduct similar to that permitted under the order.

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are non-profit public health organizations and professional medical societies that for decades have confronted the devastating health and economic consequences of tobacco use. Hence, *Amici* are especially qualified to assist this Court in comprehending the gravity of Philip Morris's actions in deceptively producing and promoting so-called "Light" and "Lowered Tar and Nicotine" cigarettes, as found by the trial court, below.

Amici address this Court in order to place the proceedings below in their broader context, and to emphasize the consequences of the fraud and deception committed by Philip Morris. These consequences are not limited to the economic interests of those who purchased cigarettes in Illinois. Rather, the consequences of Defendant's actions upon the physical and economic health of all citizens of the United States are immediate and devastating, and will reverberate for decades to come.

The American Lung Association is over 100 years old and has offices and hundreds of thousands of volunteers in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. The American Lung Association of Metropolitan Chicago and American Lung Association of the Upper Midwest are constituents of the national office of the American Lung Association and two of the oldest 501(c)(3) non-profit voluntary health organizations in Illinois.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici* represent that they authored this brief and that no person or entity other than *Amici* or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *Amici* represent that counsel for all parties have consented to the filing of this brief. Petitioners and the Respondent Law Schools have filed letters with the Clerk granting blanket consent to any party filing an amicus brief in support of either Petitioners or Respondents, and a letter reflecting Respondent Philip Morris's consent to the filing of this brief has been filed with the Clerk.

The collective mission of the American Lung Association is to reduce lung disease and promote lung health through research, education, and advocacy. They have long been active in research, education, and public policy advocacy on the adverse health effects of tobacco use, and have worked to assist smokers in their cessation efforts through the Illinois Tobacco Quit Line (1-866-QUIT-YES) and their Freedom from Smoking Online program (www.ffsonline.org).

The American Cancer Society is the world's largest voluntary health organization with a membership of three million, including many victims of tobacco-caused cancer and their family members. The American Cancer Society has representation in every state and is dedicated to eliminating cancer as a major health problem through research, education, advocacy, and service. The organization has been a leader in research on the relationship between tobacco and cancer, and it devotes substantial resources to research, public education, and direct service to those suffering from cancer caused by tobacco.

The American Academy of Otolaryngology – Head and Neck Surgery ("Academy") is a non-profit organization representing more than 10,000 otolaryngologists – head and neck surgeons who diagnose and treat disorders of the ears, nose, throat, and related structures of the head and neck. The medical disorders treated by the Academy's physicians and this specialty are among the most common that afflict all Americans, young and old (including neck cancer).

The American Thoracic Society ("ATS"), founded in 1905, is an independently incorporated, non-profit, educational, and scientific organization of physicians and scientists that focuses on respiratory and critical care medicine. ATS has approximately 13,500 dues-paying members around the world who help prevent and fight respiratory disease internationally through research, education, patient care, and advocacy. The long-range

goal of ATS is to decrease morbidity and mortality from respiratory disorders and life-threatening acute illnesses. Although ATS members work on diverse issues, all share an interest in the health effects of tobacco-related disease.

ATS is a primary scientific body that conducts studies, publishes research, and advises physicians on the health effects of tobacco. ATS implements its mission principally through four major activities: 1) scientific journals, 2) medical statements, 3) the ATS International Conference, and 4) continuing medical education credits. ATS publishes two highly respected academic journals on lung disease called *The American Journal of Respiratory and Critical Care Medicine* ("AJRCCM") and *The American Journal of Respiratory Cell and Molecular Biology* ("AJRCMB"). Both journals include studies of health effects caused by tobacco. AJRCCM and AJRCMB are featured frequently in the mainstream and trade press, and the Science Citation Index ranks the journals first and second, respectively, filtered under "respiratory system." In addition to publishing research studies, ATS also publishes medical statements that give expert opinion on how to diagnose and treat lung-related diseases, such as asthma, chronic obstructive pulmonary disease, occupational lung disease, and other lung diseases that are caused by or exacerbated by tobacco.

The Illinois State Medical Society ("ISMS") is a non-profit, professional organization comprised of over 12,000 practicing physicians, medical residents, and medical students. ISMS membership encompasses practicing physicians from a broad range of specialties, geographic locations, and types of practice. ISMS, by virtue of being the most broadly based professional association representing Illinois physicians, has a vital interest in resolution of public health issues facing the citizens of Illinois.

The Oncology Nursing Society ("ONS"), the largest professional oncology association in the world, is composed of more than 33,000 registered nurses and other

healthcare providers dedicated to excellence in patient care, education, research, and administration in oncology nursing. As tobacco use is responsible for one in three cancer deaths in the United States, ONS has long-standing policy regarding the regulation of tobacco products to help reduce and prevent tobacco-related disease, disability, and death. ONS maintains a steadfast commitment to supporting policies, programs, and other efforts that seek to reduce adult and youth tobacco use, promote tobacco cessation, protect nonsmokers against secondhand smoke, and help increase access to tobacco use prevention and cessation services.

The American Heart Association ("AHA") is a voluntary health organization founded in 1924 to reduce death and disability from cardiovascular diseases and stroke, which are the #1 and #3 largest killers of Americans. AHA is one of the world's premier health organizations, with 22.5 million volunteers and supporters in nearly 2,000 community organizations in the 50 states as well as in Washington, D.C. and Puerto Rico. The association invested more than $473.5 million in fiscal year 2004-05 for research, professional and public education, community service, and advocacy so people across America can live stronger, longer lives. AHA has long been active before Congress and regulatory agencies on tobacco and other health- related matters.

Founded in 1872, the American Public Health Association ("APHA") is the oldest, largest, and most diverse organization of public health professionals in the world. The association aims to protect all Americans and their communities from preventable, serious health threats and strives to assure community-based health promotion and disease prevention activities and preventive health services are universally accessible in the United States. APHA represents a broad array of health providers, educators, environmentalists, policy-makers, and health officials at all levels working both within and outside governmental organizations and

educational institutions. APHA advocates for FDA's authority to regulate tobacco and all tobacco products and supports improving the public's health through a comprehensive approach to preventing tobacco use among children and teens, helping current tobacco users quit, and protecting the public from the impact of second-hand tobacco smoke.

NATURE OF THE CASE

The Supreme Court of Illinois, in a narrowly divided decision, reversed a state trial court judgment that defendant Philip Morris had violated provisions of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/2, and the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS § 510/2, in connection with the manufacture, promotion, and sale of "Light" and "Lowered Tar and Nicotine" cigarettes in the State of Illinois.

From the public health point of view, the Illinois Supreme Court's decision is deeply disturbing. The Light Cigarette fraud perpetuated on the American public was one of the most heinous health frauds carried out in this nation's history. As the trial court held, Philip Morris deliberately created "a disinformation environment" in response to growing awareness of the health consequences of smoking over a period of decades. Judgment, ¶29; A. 174,[2] whereby the company "knowingly and falsely disputed scientific conclusions that established a connection between smoking and diseases." *Id.*

Not content with a strategy of disinformation alone, starting in 1971, Philip Morris began marketing "Light" and "Lowered Tar and Nicotine" cigarettes in Illinois, Judgment, ¶9; A. 169, "with the intention of

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[2] All citations to the circuit court's Judgment below include references to both the relevant paragraph of the Judgment and the corresponding page(s) of the Judgment, which has been reproduced in the Appendix filed by Petitioners. References to the Appendix are denoted as "A. _."

communicating to consumers that [these products were] less harmful or safer" than their regular counterparts. Judgment, ¶30; A. 174. Indeed, the trial court found that Philip Morris introduced its brands of "Light" cigarettes to the market "with the intent to provide smokers who were concerned about their health with a product that could reduce the cognitive dissonance associated with smoking and thereby allow them to continue to smoke cigarettes." Judgment, ¶31; A. 175. As a factual matter, the court found "Philip Morris intended to deceive consumers into believing" that their "Lights" "were less harmful or safer than their counterparts." Judgment, ¶33; A. 175.

"Class members universally understood the message of reduced risk from these products." Judgment, ¶38; A. 176. *See also* Judgment, ¶¶39-44; A. 176-78. Relying on that "message," they purchased the "Light" brands in increasingly large volume.

According to the trial court, Philip Morris's fraud and deception were not limited to its customers. Defendant actively misled government regulators and the public health community by withholding its "specific scientific and cigarette design knowledge" that revealed that "Light" and "Lowered Tar and Nicotine" cigarettes were in fact *more* harmful than regular cigarettes. Judgment, ¶¶54-55; A. 181-82. Indeed, Philip Morris shamelessly "took advantage" of the public health community's lack of accurate information to further perpetuate its fraud and deception on consumers. Judgment, ¶55; A. 182.[3]

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[3] The publication in October 2001 of the National Cancer Institute's Monograph 13, "Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine" ("Monograph 13"), confirmed the emergence of a public health community consensus that lower machine measured yields of tar and nicotine in fact did not lower the risk of disease from smoking. *See* Judgment, ¶ 79; A. 188. As the trial court found, prior to that time "the public health community was among those deceived [by Philip Morris]." Judgment, ¶ 81; A. 189-90. The trial court therefore correctly concluded that Philip Morris's

The false perception of "healthier smoking" that was carefully nurtured by Philip Morris had devastating consequences. According to the court, it led existing smokers to "delay cessation" of their smoking, and more non-smokers to initiate smoking. Judgment, ¶69; A. 186. Philip Morris undertook its actions with full knowledge that its "Light" brands did not lead to "disease reduction." Judgment, ¶68; A. 185. Indeed, quite to the contrary, Defendant knew that "Lights" were "actually more harmful and more hazardous" than their regular counterparts. Judgment, ¶70; A. 186. Finding the evidence "persuasive and disturbing," the trial court concluded that "Light" cigarettes were more mutagenic, Judgment, ¶¶71-74; A. 186-87, that their specific toxicity was greater than that of regular cigarettes, Judgment, ¶¶75-77; A. 187-88, and that both facts were well known to Philip Morris, Judgment, ¶¶75-77; A. 187-88. The consequence of their development and deceptive marketing, therefore, was a dramatic increase in the incidence of adenocarcinomas – and the testimony to support that finding was entirely unrebutted by Philip Morris. Judgment, ¶78; A. 188.

In reaching those stunning conclusions, the trial court observed that Philip Morris frequently offered no evidence to defend its actions, *see, e.g.*, Judgment, ¶¶63, 80; A. 184, 189, or proffered evidence that was implausible and/or unpersuasive, *see* Judgment, ¶¶40, 45, 47-48, 53, 59, 65, 73; A. 176-79, 181, 183, 185, 187.

As *Amici* more fully describe below, the consequences of Philip Morris's reprehensible campaign were not limited to the consumers who paid for "Light" cigarettes fully believing that they were purchasing a healthier product. Increased smoking and disease rates have had profound consequences on the health of the citizens of Illinois and

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attempt to defend its actions based on earlier statements from the public health community in support of Light cigarettes is "morally abhorrent and factually incorrect." *Id.*

all of the United States, and upon the economic stability of our health care delivery system. For these and other reasons discussed herein, *Amici* urge the Court to grant the petition and reverse the decision of the Illinois Supreme Court.

I. The Consequences of Philip Morris's Actions Go Far Beyond the Damages Found Below to Cigarette Consumers.

Like any product, cigarettes are sold in markets that rely on accurate information to facilitate informed consumer choice about their purchasing decisions. When consumers are deceived or defrauded as they were here, they cannot make informed choices. They will instead demand more of certain products than they otherwise would if they were accurately informed of the product's characteristics and the consequences of its consumption. Indeed, that is precisely what the circuit court found here. Judgment, ¶46; A. 178-79.

Deceptive and fraudulent advertising, therefore, not only robs wealth from consumers and transfers it to the deceiving seller – here, Philip Morris – but also corrodes the effectiveness of markets, leading to a misallocation of resources and a diminution in consumer welfare. More resources – here, "Light" cigarettes – are produced and consumed than would otherwise be the case, and at higher prices.

Deceptive and fraudulent advertising that impacts health is even more costly to society, leading not only to a misallocation of resources, but also to externalities in the form of health care costs that must be borne individually and more generally through insurance, Medicaid, and other forms of public assistance. The true dimension of Philip Morris's conduct, therefore, must be considered in the context of its overall impact on public health in America and the public health economy.[4]

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[4] In our brief as *amici curiae* in the Supreme Court of Illinois, we cited a series of Illinois-specific health and economic consequences of

A. The public health consequences of smoking have been devastating.

Tobacco-related illnesses are the leading cause of preventable death in the United States, killing more than 400,000 people annually. In fact, one in every five deaths in the United States is smoking related. *See* Centers for Disease Control and Prevention, *Cigarette Smoking Related Mortality, 2001.*[5] Indeed, smoking is responsible for 87% of deaths from lung cancer, 21% of deaths from heart disease, and 18% of deaths from stroke, and 80-90% of deaths from chronic obstructive pulmonary disease (emphysema and chronic bronchitis) are due to smoking. *See* Centers for Disease Control and Prevention, *Tobacco-Related Mortality, 2004.*[6] Secondhand smoke is responsible for an estimated 38,000 annual deaths in the United States, and approximately 40 million children in the United States aged 3-19 are exposed to secondhand smoke. *See* American Lung Association, *Secondhand Smoke and Children Fact Sheet.*[7]

Deaths, alone, however, do not tell the entire story. For every person who dies of a smoking-attributable disease, there are 20 people suffering from smoking-related illness. *See* Centers for Disease Control and Prevention, *Cigarette Smoking-Attributable Morbidity – U.S., 2000,* MMWR Vol. 52(35) (Sept. 5, 2003).[8]

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tobacco use. In this brief, in an effort to convey the grievous consequences of Philip Morris's conduct, we broaden the scope of health and economic consequences to the United States as a whole.

[5] Available at http://www.cdc.gov/tobacco/research_data/health_consequences/mortali.htm.

[6] Available at www.cdc.gov/tobacco/factsheets/tobacco_related_mortality_factsheet.htm.

[7] Available at http://www.lungusa.org/site/pp.asp?c=dvluk9O0E&b=39857.

[8] Available at http://www.cdc.gov/tobacco/research_data/adults_prev/mmwr5235a4.htm.

Chronic Obstructive Pulmonary Disease ("COPD"), which includes emphysema and chronic bronchitis, is the fourth leading cause of death in the United States – and it is the only one of the top five causes of death that is increasing. Between 80% and 90% of COPD is caused by smoking. In the United States, COPD is responsible for more than 118,000 deaths annually. *See* Centers for Disease Control and Prevention, *The Health Consequences of Smoking, a Report of the Surgeon General, 2004.*[9]

Of all adults, an estimated 20.9% – over 44.5 million people in the United States – currently smoke. *See* Centers for Disease Control and Prevention, *Adult Cigarette Smoking in the United States: Current Estimates, December 2005.*[10] In addition, over 3 million high school students are currently smokers, and more than 350,000 children under 18 become daily smokers every year. *See* Centers for Disease Control and Prevention, *Sustaining State Programs for Tobacco Control: Data Highlights 2004.*[11] Based on current cigarette smoking patterns, an estimated 25 million Americans who are alive today will die prematurely from smoking-related illnesses, including 5 million people younger than 18. Centers for Disease Control and Prevention, *Perspectives in disease prevention and health promotion, smoking attributable mortality and years of potential life lost – United States, 1984*, 46 Morbidity and Mortality Weekly Report 444-51 (1997).

It is unquestionable that Philip Morris's actions have exacerbated these public health consequences of smoking. As noted above, the trial court below found that – deceived by Philip Morris's message that "Light" cigarettes were "healthier" – smokers smoked longer, they

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[9] Available at www.cdc.gov/tobacco/sgr/sgr_2004/factsheets/4.htm.

[10] Available at http://www.cdc.gov/tobacco/factsheets/adult cigarettesmoking_factsheet.htm.

[11] Available at http://www.cdc.gov/tobacco/datahighlights/page4.htm.

smoked more frequently and drew harder, and non-smokers joined them. Judgment, ¶¶61, 69; A. 184, 186.

B. The economic consequences of smoking in the United States have been substantial and durable.

It is well established that cigarette smoking also has widespread economic consequences. According to the Centers for Disease Control and Prevention, total annual health care expenditures in the United States related to smoking are $75.5 billion. *See* Centers for Disease Control and Prevention, *Tobacco Information and Prevention Source.*[12] Lost productivity accounts for $92.4 billion. *Id.* Hence, the true cost of smoking to the health care economy is in excess of $167 billion – more than $500 per capita. *Id.* In 2002, each pack of cigarettes sold in the United States cost an estimated $7.18 in health care costs and productivity losses. *See* Centers for Disease Control and Prevention, *Annual smoking-attributable mortality, years of potential life lost, and economic costs in the United States*, 1995B1999, *MMMWR* 2002; 51:300B303.[13] It is estimated that 14% of all Medicaid expenses and 10% of all Medicare expenditures are attributable to tobacco use. LS Miller, et al., *State estimates of Medicaid expenditures attributable to cigarette smoking, Fiscal Year 1993*, 113 Public Health Reports 140-51 (1998).

II. Philip Morris's Fraudulent and Deceptive Advertising Campaign Was Pivotal to Its Strategy To Promote Smoking.

Members of the public health community have long struggled to respond effectively to the devastating health consequences of cigarette smoking and to give smokers meaningful information in the face of the well-funded efforts of the tobacco industry to continue to promote smoking. Indeed, the relative impact of industry

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[12] Available at http://www.cdc.gov/tobacco/overview/fast_facts.htm.

[13] Available at http://www.cdc.gov/mmwr/PDF/wk/mm5114.pdf.

advertising on consumer awareness cannot be ignored. That is why the cigarette companies spend an estimated $15.15 billion annually marketing their products nationwide. Federal Trade Commission, *Cigarette Report for 2003* (2005) ("*FTC 2003 Cigarette Report*").[14]

According to the Campaign for Tobacco-Free Kids, published "research studies have found that kids are three times more sensitive to tobacco advertising than adults and are more likely to be influenced to smoke by cigarette marketing than by peer pressure, and that one third of underage experimentation with smoking is attributable to tobacco company advertising." National Center for Tobacco-Free Kids, *The Toll of Tobacco in Illinois*.[15]

The civil action brought by Plaintiffs here focuses on perhaps the most subtle and pervasive aspect of this onslaught of advertising in the form of package labeling: deception – the intentional marketing of a "Light" brand with full knowledge that consumers assumed that it was a more "healthy" cigarette, even though Philip Morris well knew that "Light" meant anything but "healthier." Eighty-five percent of all cigarettes sold in the United States are low tar or "Light" brands, and Marlboro is the most popular brand in the United States. *FTC 2003 Cigarette Report, supra.*

A. The fraudulent marketing of cigarettes as lower delivery and lower risk products is an urgent public health issue.

Amici urge this Court to be mindful of the real-world consequences of Philip Morris's fraud on the consuming public. As Monograph 13 states in its introduction:

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[14] Available at http://www.ftc.gov/reports/cigarette05/050809cigrpt.pdf.

[15] Available at http://www.tobaccofreekids.org/reports/settlements/state.php?StateID=IL.

> The absence of meaningful differences in smoke exposure, when different brands of cigarettes are smoked, and the resultant absence of meaningful differences and risk make the marketing of these cigarettes as lower delivery and lower risk products deceptive for the smoker. The reality that many smokers chose these products as an alternative to cessation – a change that would produce real reductions in disease risks – *makes this deception an urgent public health issue.*

Monograph 13, at 1 (internal citations omitted) (emphasis added). *See also* Federal Trade Commission, *FTC Consumer Alert: Up in Smoke: The Truth About Tar and Nicotine Ratings* (May 2000).[16]

The implications of Philip Morris's fraud on public health are therefore enormous. "Many smokers switch to lower yield cigarettes out of concern for their health, believing these cigarettes to be less risky or to be a step toward quitting." Monograph 13, at 10. Philip Morris, with knowledge that "Lights" smokers do not reduce their risk of exposure to tar (and consequently do not reduce their disease risk), deceived smokers into believing that they were doing something better for their health by switching to "Lights" brands. At the trial of this case, experts for Plaintiffs, themselves distinguished members of the public health community, testified that, had smokers not viewed "Lights" as an alternative to quitting, they may have stopped smoking and actually reduced their risk of disease. *See* Testimony of Dr. Thun, R04027 ("the false perception that one is avoiding risk may cause some smokers to delay cessation"); Testimony of Dr. Burns, R04319-20) (testifying that, if smokers had not been provided alternatives to quitting, such as Marlboro Lights and Cambridge Lights, they may have quit, actually reducing their disease risk). The trial court

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[16] Available at http://www.ftc.gov/bcp/conline//pubs/alerts/smokealrt.htm.

specifically credited this evidence in reaching its conclusions. *See* Judgment, ¶¶67-70, 78; A. 185-86, 188 (discussing testimony of Dr. Thun).

Consistent with the testimony in the trial court, the public health community has concluded that "[s]everal tactics were employed by the tobacco industry that misled consumers to perceive low-tar delivery products as safe or safer and as a viable alternative to quitting." Monograph 13, at 231. *See also id.* at 233 ("Advertisements of filtered and low-tar cigarettes were intended to reassure smokers (who were concerned about the health risks of smoking) and were meant to prevent smokers from quitting based on those same concerns.").

The trial court found that "Marlboro Lights and Cambridge Lights were health reassurance cigarettes in that they expressly and impliedly conveyed the notion of a positive health attribute through the representations of 'Lights' (with respect to Marlboro Lights and Cambridge Lights) and the representation of 'Lowered Tar and Nicotine' (with respect to Marlboro Lights)." Judgment, ¶35; A. 175-76. The devastating reality is that the market share of cigarettes sold with a tar yield of 15 mg. or less has increased from a mere 2% in 1967 to nearly 85% today. *See FTC 2003 Cigarette Report*, at Table 4. Thus, Philip Morris's "Lights" fraud contributed substantially to the public health crisis of smoking.

It is contrary to public policy for an entity to act in a way that is injurious to the health and safety of citizens. *See Metz v. Department of Professional Regulation*, 773 N.E.2d 1234 (Ill. Ct. App. 2002); *Chicago Steele Wool & Dye Fabricators Co. v. ADT Security Systems*, 763 N.E.2d 839 (Ill. Ct. App. 2002). The evidence presented at trial clearly demonstrated a course of conduct by Philip Morris that is in violation of that public policy. Indeed, the trial court found that Philip Morris's course of conduct with respect to the representations "lowered tar and nicotine" and "lights" not only offended public policy, but also was "immoral, unethical, oppressive and unscrupulous," and

"caused substantial injury to the Class members in this case." Judgment, ¶147; A. 207.

B. The Illinois trial court's findings regarding Philip Morris's fraud are supported by a growing nationwide and worldwide consensus of health authorities.

As the trial court found, "many of the experts who offered opinions on behalf of the Plaintiffs in this case are leaders in their scientific fields, and national leaders of the public health community." Judgment, ¶5; A. 168-69. Based on this expert testimony – and Philip Morris's own documents – the trial court found that "[c]ompensatory smoking behavior . . . including but not limited to inhaling deeper, more frequent puffs, larger puffs and holding the smoke in the lungs for a longer period of time . . . result in there being no difference for an individual smoker between the tar and nicotine delivery from a Marlboro Lights cigarette as compared to a regular Marlboro cigarette (the same being true of Cambridge Lights cigarettes and regular Cambridge cigarettes)." Judgment, ¶61; A. 184. The trial court further found that "Marlboro Lights and Cambridge Lights are just as harmful as regular Marlboro and regular Cambridge for all Class members in this case." Judgment, ¶66; A. 185. Indeed, the court found that Light cigarettes are *more* harmful than their regular counterparts. Judgment, ¶70; A. 186.

The conclusions reached by Plaintiffs' experts and the circuit court regarding the absence of any risk reduction from smoking Lights, and the misleading nature of that term, are now widely accepted in the public health community. A study that reviewed epidemiological data collected during the American Cancer Society's Cancer Prevention Study II concluded that "[t]here was no difference in risk among men who smoked brands rated as very low tar or low tar compared to those who smoked medium tar brands." Harris, Thun, et al., *Cigarette Tar Yields In Relation to Mortality from Lung Cancer in the Cancer Prevention Study II Prospective Cohort, 1982-8,*

British Med. J. 328:72, 2004. Even more recently, the 2004 Surgeon General's Report on Smoking and Health concluded that, "[a]lthough characteristics of cigarettes have changed during the last 50 years and yields of tar and nicotine have declined substantially, as assessed by the Federal Trade Commission's test protocol, the risk of lung cancer in smokers has not declined." U.S. Department of Health and Human Services, *The Health Consequences of Smoking, 2004*, at 324.[17]

The Canadian Government has banned the use of the terms "light" and "low tar" in Canadian cigarette advertising, concluding "that terms such as 'light' and 'mild' in tobacco marketing in Canada are both false and misleading" and that "[s]ubstantial proportions of Canadian smokers are being deceived in that they believe these products deliver less tar and nicotine and are less harmful to smokers' health. Allusions to milder taste, as well as actual taste differences, compound this deception." Pls. Ex. 59. The European Union also recently adopted a ban of such descriptors after concluding that "certain texts, such as 'low-tar,' 'light,' 'ultra-light,' 'mild' . . . may mislead the consumer into the belief that such products are less harmful." Pls. Ex. 61. Shortly after trial, in May 2003, the 192 member states of the World Health Organization completed negotiation of the world's first public health treaty, the Framework Convention on Tobacco Control, which includes a provision requiring parties to the treaty to enact legislation banning the use of any descriptor "that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as 'low tar,' 'light,' 'ultra-light,' or 'mild[.]'" To

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[17] Available at http://www.hhs.gov/surgeongeneral/library/smokingconsequences/.

date, 168 countries, including the United States, have signed the treaty, and 140 have ratified it.[18]

Thus, the findings of the trial court in this case are consistent with a growing world-wide consensus: descriptors on cigarettes that convey a message of reduced risk are deceptive and misleading.

Further, the trial court found that "Philip Morris had specific scientific and cigarette design knowledge that the public health community did not possess related to Lights cigarettes generally as well as Marlboro Lights and Cambridge Lights cigarettes specifically." Judgment, ¶55; A. 182. The public health community has now reached a similar conclusion. As explained in the preface to Monograph 13, access to previously secret files of the tobacco industry has revealed the scope of industry efforts to endanger the public health through false advertising, and increased the public health community's awareness to the fraud of "Light" cigarettes:

> For the first time, the authors who prepared the various chapters have had extensive access to the information gleaned from the internal documents of the tobacco companies .... Included are marketing strategies that express the growing concern among the various tobacco companies of the potential loss of new recruits. This concern over the potential loss of market was due to the evolving public opinion that smoking is harmful to health and that it is related to many of the illnesses that smokers experience over the course of their lives.
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>
> Access to internal industry papers allowed monograph authors to cite a number of tobacco company documents that show a long-term trend

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[18] *See* http://www.who.int/tobacco/areas/framework/signing_ceremony/countrylist/en/; http://www.who.int/tobacco/framework/countrylist/en/index.html.

> altering the tar and nicotine content of cigarettes by various chemical and mechanical procedures. The documents further reveal the industry's efforts to produce cigarettes that could be marketed as acceptable to health-conscious consumers. Ultimately, these low-tar/low-nicotine cigarettes were part of the industry's plan to maintain and expand its consumer base.

Monograph 13, preface at i-ii.

III. The Divided Decision of the Illinois Supreme Court Warrants Review by this Court.

In concluding that Petitioners' action should be dismissed, the Illinois Supreme Court did not take issue with any of the well-supported findings of the trial court or the public health consequences of Philip Morris's actions as described herein. Instead, based on its own novel interpretation of federal law, it held that Philip Morris was completely immunized from liability because in the court majority's view two FTC consent decrees – with *other* cigarette manufacturers – constituted an "express authorization" of Philip Morris's campaign of deception.[19]

The majority's misinterpretation of federal law regarding the operation and legal significance of FTC consent decrees led directly to what Justice Freeman labeled in dissent "an erroneous and irresponsible interpretation" of the Illinois Consumer Fraud Act. 219

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[19] Critically, in so holding, the majority looked to "the FTC's own published materials and cases from the United States Supreme Court and the federal courts for additional authority . . . to determine what constitutes 'specific authorization' and whether PMUSA used the terms 'lights' and 'lowered tar and nicotine' under such authority." *Price v. Philip Morris, Inc.*, 219 Ill.2d 182, 253, 848 N.E.2d 1, 43 (2005). "*Based on these other authorities*, read in conjunction with Illinois law," the Illinois Supreme Court concluded that "the FTC could, and did, specifically authorize all United States tobacco companies to utilize the words 'low,' 'lower,' 'reduced' or like qualifying terms, such as 'light,'" provided it was accompanied by an appropriate disclosure. 219 Ill.2d at 265, 848 N.E.2d at 50 (emphasis added).

Ill.2d at 286, 848 N.E.2d at 61. If left standing, that interpretation will both significantly impair the FTC's ability to resolve litigation in cases involving unfair and deceptive practices – especially in the tobacco industry – and seriously undermine the State of Illinois's ability to protect its citizens while respecting the clear wishes of federal agencies – something it clearly intended to do through its Consumer Fraud Act. The discretion of federal agencies to resolve cases will have been compromised, and a sensible balance of federal and state authority will have been thoroughly disrupted.

It is imperative, therefore, that this Court grant the petition for a writ of certiorari in this case. If it does not, the public health and economic consequences of the marketing of so-called "light" cigarettes as described in this brief will continue unredressed.

CONCLUSION

From a public health standpoint, the detrimental consequences of Philip Morris's conduct have been enormous. Its brazen conduct has substantially injured the health and safety of Americans, cost our country billions of dollars, and offends the public policy.

For the foregoing reasons, *Amici* urge this Court to grant the petition for a writ of certiorari to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

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No. 06-465

IN THE
Supreme Court of the United States

SHARON PRICE AND MICHAEL FRUTH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST AND CITIZEN ACTION/ILLINOIS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a negotiated Federal Trade Commission consent order operates, as a matter of federal law, as a safe harbor immunizing non-parties to the consent order from liability under otherwise applicable state law for conduct similar to that permitted under the order.

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INTERESTS OF THE *AMICI CURIAE* [1]

Amicus curiae Business and Professional People for the Public Interest (BPI) is a public interest law and policy center founded in 1969 by Gordon B. Sherman, then-president of the Midas Muffler Corporation. BPI seeks out and addresses compelling issues of social justice and quality of life in the Chicago region. BPI's staff of lawyers and policy analysts use legal and policy research, advocacy, organizing, litigation, and collaboration with non-profit, business, community and governmental organizations to accomplish its mission. BPI works to transform segregated public housing, revitalize economically disadvantaged communities, improve Chicago's public schools, and increase the supply of affordable housing throughout the region.

Amicus curiae Citizen Action/Illinois is the largest public interest organization in Illinois and is a political coalition committed to creating social change both in Illinois and across the nation. Founded in 1997, Citizen Action works on behalf of the public interest both in the Illinois state capital and Washington, D.C. and is built on a tradition of strong grassroots citizen organizations. Citizen Action's organizational affiliates include statewide organizations and local groups, represented on a 97-member Policy Council which also includes leaders serving as individuals, among them members of Congress, state legislators, and local government officials. The organization is based on several core values: a belief that every human life has equal worth, that the purpose of our society is to allow all its members to live meaningful and fulfilling lives, and that there is a collective good beyond our individual interests. Citizen Action seeks to promote and win public policies that reflect these values and embody social justice.

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[1] No counsel for a party authored any part of this brief. No person or other entity other than *amici curiae* contributed monetarily to the preparation and submission of this brief. Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

Amici support the petition for a writ of certiorari in this case first because it presents an important question concerning the effect of widely-used Federal Trade Commission consent decrees. Of equal concern, however, is the way in which the Illinois Supreme Court decided this case: allowing the deciding vote in a case impacting millions of Illinois citizens to be cast by a judge seated on the state's highest court ***after*** the case was submitted for final decision and ***after*** that judge had just received generous election campaign donations from the very party in whose favor he cast that deciding vote. Thus the way in which this case was decided—a case which undeniably and significantly effects so many—is an additional factor which weighs heavily in favor of this Court granting the petition for a writ of certiorari.

STATEMENT OF THE CASE

After initially refusing to accept a direct appeal in this case from the trial court, the Illinois Supreme Court later ordered a direct appeal *sua sponte* in September 2003, taking the case from further consideration by the intermediate appellate court and bypassing the normal appellate process. Between that time and December 15, 2005 (when the Court issued its decision), a seat on the supreme court was vacated as a result of the retirement of one of the justices. That seat was filled during the pendency of the case through a partisan election in November 2004 which was the costliest judicial race in American history.

One of the candidates for the open seat was Judge Gordon Maag, who had presided over appellate court proceedings regarding the amount of the appeal bond before the supreme court took the direct appeal. Judge Maag therefore would not have been able to participate further in the case as a supreme court justice had he been elected. The other candidate was then-Washington County circuit court Judge Lloyd Karmeier. Justice Karmeier won the election on November 4, 2004, and took office on December 1.

During the campaign, Justice Karmeier raised and spent more than $4.8 million.[2] He received millions of dollars in campaign donations collectively from Philip Morris's *amici* supporters, Philip Morris's trial counsel, Altria Corporation (Philip Morris's parent corporation), and even from Philip Morris itself. Altria Corporation (both in its own name and on behalf of Philip Morris), Philip Morris's trial counsel, and *amici* counsel contributed $22,000 to the Illinois Manufacturers Association (one of Philip Morris's *amicus* supporters in the case) through contributions to the Manufacturers' PAC. State of Illinois Judicial Inquiry Board, Request for Investigation of Justice Lloyd Karmeier at 12 (available at http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=1413079). These donations were, in turn, contributed directly to the Karmeier campaign. *Id.* Altria's subsidiary, Kraft Foods, is a member of the Illinois Civil Justice League (ICJL) which filed an *amicus* brief in support of Philip Morris (later rejected on procedural grounds). *Id.* The ICJL's political action committee, JUSTPAC, contributed $1,191,452.72 to the Karmeier campaign. *Id.*

Justice Karmeier's campaign also accepted donations from Philip Morris's trial counsel in this case, from the law firms representing Philip Morris at trial and on appeal, and from law firms and lawyers representing Philip Morris's *amici* supporters. *Id.* Justice Karmeier accepted over $1.6 million from the United States Chamber of Commerce paid through contributions to the Illinois Republican Party, which in turn forwarded the monies to the Karmeier campaign. *Id.* The Chamber later filed an *amicus* brief in support of Philip Morris in the supreme court. Justice Karmeier's campaign also received

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[2] Illinois places no limits on the amounts or sources of campaign contributions that a candidate, judicial or otherwise, may accept. Individuals, corporations, and groups, including political action committees, may all donate to judicial campaigns. The Illinois Election Code, 10 ILCS § 5/9-1, *et seq.*, imposes disclosure requirements on candidates and groups which accept contributions or make expenditures.

$284,338.32 directly from affiliates of the United States Chamber of Commerce, the Illinois Chamber of Commerce (another Philip Morris *amicus* supporter), Illinois Chamber PAC, and Chicagoland Chamber of Commerce PAC. *Id.*

On November 10, 2004, prior to Justice Karmeier taking office, the supreme court heard oral arguments. As a result of the vacant seat and another justice's recusal (Pet. App. at 88a), only five justices heard argument in the case. If only those five justices had decided the case, the trial court's judgment would have been affirmed because only three of them ultimately voted to reverse the judgment; the Illinois constitution requires the concurrence of four justices to overturn a lower court decision, even when fewer than all seven justices hear a case. ILL. CONST. ART. VI, § 3. However, more than a year after oral argument, the supreme court issued its decision reversing the trial court's judgment by a one-justice margin. Despite having received millions of dollars in campaign donations collectively from Philip Morris's *amici* supporters, Philip Morris's trial counsel, Altria and even from Philip Morris itself, Justice Karmeier participated in the decision of the case and provided the pivotal vote to reverse the trial court's judgment against Philip Morris.

The majority pointedly noted that their decision should in no way be interpreted as an exoneration of Philip Morris. Pet. App. at 81a ("Our resolution of the present case is in no way an expression of our approval of PMUSA's alleged conduct."). *See also id.* at 98a (Karmeier, J., concurring) ("I hasten to add, as the majority opinion did, that rejection of plaintiffs' cause of action should in no way be construed as an endorsement of PMUSA's conduct. Our reversal of the circuit court's judgment is not an exoneration of PMUSA."). Justice Karmeier even agreed that the record supported a finding that Philip Morris had committed fraud. *See id.* at 89a-90a ("The record in the case before us shows that PMUSA developed and marketed Marlboro Lights and Cambridge Lights cigarettes in re-

sponse to heightened public concern over health risks posed by smoking. ... In reality, and as PMUSA was fully aware, the so-called 'light' cigarettes not only offered no health benefits, but were actually more toxic."). The majority nevertheless reversed on the rationale that the FTC had specifically "authorized" Philip Morris's use of the "lights" and "lowered tar" terms.

In an apparent attempt to insulate their conclusion from this Court's review, after discussing the issue of federal preemption at some length, the four justices avoided drawing the obvious legal conclusion from their ruling: the FTC's "authorization" of Philip Morris's conduct would preempt Petitioners' state law claims. The justices instead concluded that such FTC "authorization" defeated Petitioners' claims as a matter of state law. Justice Karmeier authored a special concurrence explaining that he would reverse the trial court on the additional ground that the defrauded plaintiffs had not proven they had suffered any actual damages, proving prophetic the *St. Louis Post Dispatch*'s observation that "[b]ig business won a nice return on a $4.3 million investment in Tuesday's election. It now has a friendly justice on the Supreme Court of Illinois. ... [A]nyone who believes in evenhanded justice should be appalled at the spectacle of a big-money effort to buy a Supreme Court seat." *Buying Justice*, ST. LOUIS POST-DISPATCH, Nov. 5, 2004 at B6.

ARGUMENT

I. THIS CASE INVOLVES AN ISSUE OF GREAT PUBLIC IMPORTANCE DESERVING OF THIS COURT'S REVIEW NOT ONLY BECAUSE OF THE SUBSTANCE OF THE HOLDING BELOW, BUT ALSO BECAUSE OF THE QUESTIONABLE WAY IN WHICH IT WAS DECIDED BY A STATE SUPREME COURT.

As this Court has recognized, maintaining the integrity of the judiciary and respect for its judgments is a vital interest "of the highest order." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). Courts have a compelling interest in protecting against the possibility of public perception that judicial action "did not flow only from the fair and orderly working of the judicial process." *Cox v. Louisiana*, 379 U.S. 559, 565 (1965). In the context of elective offices, such as seats on the Illinois Supreme Court, there is also a compelling interest in preventing "the eroding of public confidence in the electoral process through the appearance of corruption." *McConnell v. FEC*, 540 U.S. 93, 136 (2003).

That vital interest of preventing the appearance of corruption is "not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 389 (2000). Preventing such appearances is all the more imperative in the context of judicial elections in light of the fact that in the judicial realm, only two litigants are before a judge, and only one of them will win; the other will necessarily lose.

For these reasons, this Court has previously held that the Due Process Clause requires the recusal of a state supreme court justice where his participation as the decisive vote creates the appearance of potential bias. *Aetna Life Ins. Co. v Lavoie*, 475 U.S. 813 (1986). In *Aetna*, this Court held that Alabama Supreme Court Justice Embry

should have been disqualified from participation in a case in which he had cast the deciding vote under circumstances which created an appearance of bias. *Id.* The Court observed, "to perform its high function in the best way, justice must satisfy the appearance of justice." *Id.* at 825. Thus, as a consequence of Justice Embry casting the decisive vote in a 5-4 decision, the Court held that the "'appearance of justice' will best be served by vacating the decision and remanding for further proceedings." *Id.* at 828 (quoting *In re Murchison*, 349 U.S. 133 (1955)).

Like Justice Embry's vote in *Aetna*, Justice Karmeier's deciding vote in this case has been widely perceived as one bought by special interests. Even a newspaper which endorsed Justice Karmeier described the election as an "ugly, dispiriting, destructive, misleading, money drenched race," and suggested that Justice Karmeier might be tempted to "do favors for the interests that lavished millions on his campaign" and that the average citizen must be "wondering if it's payback time." *Buying Justice*, ST. LOUIS POST-DISPATCH, Dec. 20, 2005 at B6. "'Karmeier's election changed the vote,' said Edward Murnane, president of the nonprofit Illinois Civil Justice League, which contributed $1.2 million to judge's campaign and filed an *amicus* brief supporting Philip Morris." Barbara Rose, *Philip Morris Law Firms, Supporters Backed Judge*, CHICAGO TRIBUNE, December 16, 2005. The *Tribune* article also noted that Justice Karmeier had received $1.2 million from the Illinois Civil Justice League. *Id.*

Justice Karmeier's opinion that the defrauded plaintiffs had not proven they had suffered any actual damages echoed that advocated in an *amici* brief filed in support of Philip Morris by two interests which had donated $22,000 to the judges campaign—the precise sum Philip Morris and its parent company had contributed to those two organizations. *See* Brief of the National Association of Manufacturers and the Illinois Manufacturers' Associa-

tion as Amici Curiae in Support of Appellant Philip Morris USA Inc., 2003 WL 25291621.

Shortly after the decision, Justice Karmeier was depicted in a political cartoon sitting on a mule with sacks of Philip Morris money and a package of "Karmeier Lights," parodying a Marlboro Lights ad. The caption read: "More freedom from class action lawsuits." ST. LOUIS POST-DISPATCH, Dec. 20, 2005 at B6. "[A]n ordinary citizen, jaded by Illinois' long history of government shenanigans, might wonder whether Mr. Karmeier was simply returning the favor. Considering that Mr. Karmeier never heard the arguments made in the Philip Morris case (he came on the bench a month after the case was argued) and the glaring appearance of conflict of interest, a decent argument for recusal could be made." *Id.*

Although Petitioners have raised no due process or recusal issues in their petition, the question they have raised regarding the appropriate interpretation of FTC consent decrees is an important one which this Court should resolve. The Illinois Supreme Court's dubious resolution of that question despite even more dubious appearances underscores the need for this Court's intervention.

II. THE FOUR JUSTICES' RESOLUTION OF THE PROPER INTERPRETATION OF FEDERAL TRADE COMMISSION CONSENT ORDERS "ENTIRELY" ON STATE LAW GROUNDS WAS AN ATTEMPT TO SHIELD THEIR DECISION BY REVIEW IN THIS COURT, ANOTHER FACTOR WHICH SUPPORTS A GRANT OF CERTIORARI.

"It is settled law that a judgment of a state court which is put upon a nonfederal ground" may be reviewed in this Court when "the nonfederal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question." *McCoy v. Shaw*, 277 U.S. 302, 303 (1928). *Accord Ward v. Love County*, 253 U. S. 17, 22 (1920); *Enterprise Irrig. Dist. v. Canal Co.*, 243 U. S. 157,

164 (1917); *Leathe v. Thomas*, 207 U. S. 93, 99 (1907). As Justice Holmes hypothesized:

> there might be cases where, although the decision put forward other reasons, it would be apparent that a Federal question was involved, whether mentioned or not. It may be imagined, for the sake of argument, that it might appear that a state court, even if ostensibly deciding the Federal question in favor of the plaintiff in error, really must have been against him upon it, and was seeking to evade the jurisdiction of this court. If the ground of decision did not appear and that which did not involve a Federal question was so palpably unfounded that it could not be presumed to have been entertained, it may be that this court would take jurisdiction.

Leathe, 207 U. S. at 99 (citing *Johnson v. Risk*, 137 U.S. 300, 307 (1890)). This is such a case.

The four justice majority emphatically insisted that they had "resolved the present case entirely on the basis of state law" (Pet. App. 87a), despite narrating at length Philip Morris's arguments throughout the litigation "that this action is expressly or impliedly preempted by federal law." *Id.* Their purported resolution of this case, however, depended entirely upon their interpretation of two FTC consent orders. Even though neither of those consent orders had anything to do with the propriety of marketing cigarettes as "lights," and even though Philip Morris was not a party to either of those consent orders, the justices concluded that "PMUSA was specifically authorized" by those two FTC consent orders "to use the disputed terms ...." *Id.* at 86a. Thus, the justices' characterization of their decisions as resting exclusively on the resolution of state law was at least somewhat disingenuous, and a fairly transparent device to prevent review in this Court on the federal preemption question.

The Federal Trade Commission has never adopted a single trade regulation rule governing the advertising of

so-called "light" cigarettes. The FTC has never defined the term "light." Federal Trade Commission Notice, *Cigarette Testing; Request for Public Comment*, 62 Fed. Reg. 48,158 (1997). Neither of the two consent orders which the justices purported to interpret said anything about the use of the term "lights." Their conclusion that the FTC "authorized" any cigarette company's use of the term "lights"—let alone Philip Morris's use of that term in particular—"is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review" in this Court.

Moreover, the justices' conclusion that the FTC had "authorized" Philip Morris's use of the terms "lights" and "lowered tar" is tantamount to a conclusion that state law claims challenging the use of those terms are federally preempted. It has long been recognized that "a federal agency may pre-empt state law" when "it is acting within the scope of its congressionally delegated authority." *Louisiana Pub. Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986). If the FTC had really "authorized" Philip Morris's use of the term "lights," the justices should have had little trouble concluding that Petitioners' claims were preempted. This is particularly true because they had already made the express finding that the FTC was "operating under statutory authority." Pet. App. at 55a. It is at least plausible, if not likely, that the justices sidestepped that obvious legal conclusion in an attempt to evade this Court's review.

The question regarding the effect of a Federal Trade Commission consent order is rather obviously a question of federal law. The decision below which hinged on that very question was therefore not resolved "entirely on the basis of state law," the justices' assertion to the contrary notwithstanding. The decision below bears the earmarks of a lower court "seeking to evade the jurisdiction of this court." This is an additional and compelling reason for the Court to grant certiorari.

CONCLUSION

Illinois is just one of thirty-eight states that elect their high court justices. Deborah Goldberg *et al., The New Politics of Judicial Elections 2004*, vi (Justice At Stake 2005) (available at http://www.JusticeatStake.org/files/NewPoliticsReport2004.pdf). During the 2001-02 election cycle, supreme court candidates in seven states each raised more than $1 million, a number which increased to 11 states in the 2003-04 election cycle. Deborah Goldberg *et al., The New Politics of Judicial Elections 2002*, 19 Fig. 9 (Justice at Stake 2004) (available at http://faircourts.org/files/NewPoliticsReport2002.pdf).

More than seventy percent of Americans believe that judicial campaign contributions have at least some influence on judges' decisions in the courtroom. Justice at Stake Campaign, *March 2004 Survey Highlights: Americans Speak Out On Judicial Elections* (2004) (available at http://faircourts.org/files/ZogbyPollFactSheet.pdf). The judiciary share the public's concern. According to a 2002 written survey of 2,428 state lower, appellate, and supreme court judges, nearly half of the judges surveyed (forty-six percent) themselves believe that campaign contributions to judges influence their decisions. Greenberg Quinlan Rosner Research & American Viewpoint, Justice At Stake State Judges Frequency Questionnaire at 5 (2002) (available at http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf). And more than seventy percent of surveyed judges expressed concern regarding the fact that, "[i]n some states, nearly half of all supreme court cases involve someone who has given money to one or more of the judges hearing the case." *Id.* at 9. Justice Karmeier himself wondered, "How can people have faith in the system?" Ryan Keith, *Spending for Supreme Court Renews Cry for Finance Reform*, Assoc. Press (AP Wire), Nov. 3, 2004.

Precisely because of the contributions to Justice Karmeier's campaign, the decision below itself is at the very least suspect, and this is not the first such decision. The

very same four justices reached the same sort of controversial result in another consumer class action involving a large judgment against a large insurance company. *Avery v. State Farm Mut. Auto Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), *cert. denied*, 126 S.Ct. 1470 (2006). The appearance of propriety is every bit as important as actual propriety, especially where courts are concerned. Accordingly, flagrant appearances of impropriety should sometimes inform this Court's decision whether to grant certiorari. This is one of those times. For all these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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